85-1239

No. 85-____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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AMOCO PRODUCTION COMPANY, ARCO ALASKA, INC., EXXON CORPORATION, MOBIL EXPLORATION & PRODUCING SERVICES, INC., SHELL WESTERN E & P, INC., SOHIO ALASKA PETROLEUM COMPANY, TEXACO, INC., AND UNION OIL COMPANY OF CALIFORNIA,

*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, PEOPLE OF THE VILLAGE OF STEBBINS, AND NUNAM KITLUTSISTI, DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR,

*Respondents.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

Section 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3120(a), requires federal agencies to evaluate whether any "disposition" of lands owned by the Federal government "in Alaska" would "significantly restrict subsistence." If so, the agency must give notice of that fact, conduct hearings and make findings that, *inter alia*, the proposed disposition has been modified to reduce or remove such effects. Acting pursuant to its construction of Section 810, the Ninth Circuit has enjoined exploration activities in two federal Outer Continental Shelf (OCS) leasing areas in the Bering Sea.

In one area, leasing had proceeded without an explicit evaluation under ANILCA that leasing and subsequent activities would not significantly restrict subsistence, although analyses under other environmental statutes revealed that there would be no such effects. In the other, an explicit ANILCA evaluation had concluded that such restrictions would not occur during either leasing or exploration, but might occur at the final development/production stage of the project, and Interior had deferred the notice, hearings, and findings required by ANILCA until its consideration of that final stage. In both instances, the Court of Appeals left undisturbed the District Court's findings that the exploration, which it had refused to enjoin, would not restrict subsistence uses or otherwise irreparably injure plaintiffs and that subsistence could be fully protected by compliance with ANILCA in subsequent administrative proceedings.

Accordingly, the questions presented in this case are as follows:

1. Whether the Ninth Circuit erred in not following *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), when it mandated an injunction solely on the basis of purported violations of ANILCA, notwithstanding the district court's findings that plaintiffs would not be irreparably injured by the continuation of the enjoined operations and that Interior could comply with the statute prior to the possibility of any such injury?

2. Whether the Ninth Circuit erred in (a) holding that Section 810 of ANILCA applies to the federal OCS; (b) determining that neither federal OCS leasing nor exploration can proceed until there has been full compliance with Section 810's procedural requirements, even though neither of those activities would restrict subsistence; and (c) retroactively applying these unprecedented rulings to previously issued OCS leases?

## PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are all identified in the caption.[1] Petitioners understand that Secretary Hodel and the Department of the Interior will also petition for a writ of certiorari to review the same decision addressed by this petition.

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[1]Pursuant to Rule 28.1, petitioners' parent companies, subsidiaries and affiliates are set forth in Appendix E (A64).

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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### OPINIONS BELOW

Two opinions of the United States Court of Appeals for the Ninth Circuit are directly relevant to this petition. The first, *Village of Gambell* v. *Clark*, 746 F.2d 572 (9th Cir. 1984) (hereafter *Gambell I*), was

issued on November 2, 1984, and is reprinted at Appendix A. (A1). The second, which gives rise to this petition, was filed on October 25, 1985. It is captioned *Village of Gambell* v. *Hodel,* 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*), and is reprinted at Appendix B. (A23). The opinion of the United States District Court for the District of Alaska in *Gambell II* is reprinted at Appendix C. (A55). It was filed on May 23, 1985, and is unreported.

## JURISDICTION

This Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit's judgment was entered on October 25, 1985, and is reprinted at Appendix D. (A63a). This petition is timely. See 28 U.S.C. § 2101(c).

## STATUTES

Section 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3120(a), provides:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public

> lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency--
>
> (1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title;
>
> (2) gives notice of, and holds, a hearing in the vicinity of the area involved; and
>
> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Section 102(3) of ANILCA, 16 U.S.C. § 3102(3), defines "public lands" as

> land[s] situated in Alaska which, after December 2, 1980, are Federal lands

with three exceptions not directly relevant here.

Section 102(2) of ANILCA, 16 U.S.C. § 3102(2), in turn, defines "Federal Lands" as

> lands the title to which is in the United States after December 2, 1980.

## STATEMENT OF THE CASE

On March 4, 1983, the Villages of Gambell and Stebbins filed a complaint seeking an injunction prohibiting the Department of the Interior from conducting Outer Continental Shelf (OCS) Lease Sale No. 57 in the Norton Sound region of the Bering Sea. Plaintiffs asserted that the sale would contravene their aboriginal title to the lands in issue, fail to comply with Section 810 of ANILCA, 16 U.S.C. § 3120, and violate the trust responsibilities owed to them by the Secretary of the Interior. Both the district court and the Ninth Circuit denied plaintiffs' motion preliminarily to enjoin the sale and it went forward on March 15, 1983. Fifty-nine tracts were leased for $317,873,372.

On April 11, 1983, the district court entered summary judgment for the federal defendants and six industry intervenors (all of whom are petitioners here) who had purchased leases at the sale. On November 2, 1984, the Ninth Circuit affirmed as to the district court's rejection of plaintiffs' aboriginal title and trust claims, but reversed its holding that Section 810 of ANILCA does not apply to the federal OCS. *Gambell I.* (A1). The court remanded the case to the district court to determine whether "the proper remedy is to maintain the status quo unless and until the Secretary complies with Section 810." (A21). Six months after this remand, on April 4, 1985, plaintiffs filed a motion for a preliminary injunction against 1985 exploratory drilling in Norton Sound.

On April 23, 1985, the Village of Gambell and Nunam Kitlutsisti, an organization representing Alas-

kan Native interests, filed a new action alleging that OCS Lease Sale No. 83 in the Navarin Basin of the Bering Sea had been conducted in violation of Section 810 of ANILCA. That sale had taken place in April 1984 without challenge and resulted in the leasing of 163 tracts lying between 250 and 400 miles offshore, for a total payment of $516,317,331.[1]

The plaintiffs simultaneously requested a preliminary injunction against the then-imminent exploration planned for certain Sale No. 83 tracts. Seven industry intervenors (all of whom are petitioners here) intervened as defendants to protect their interests in their leases. Prior to plaintiffs' complaint, these intervenors had made irrevocable financial commitments to spend more than $60 million for 1985 exploration. (A51).

On May 23, 1985, the district court ruled upon plaintiffs' motions for preliminary injunctions as to both Sale Nos. 57 and 83 exploration. (A55). Relying on the Ninth Circuit's construction of ANILCA in *Gambell I*, it held that plaintiffs had established a likelihood of success on their ANILCA claims because

(1) As to Sale No. 83, an explicit evaluation had not been prepared under ANILCA regarding the sale's potential impacts upon subsistence (A58), although evaluations under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, the Endangered Spe-

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[1]High bids of $108,174,000 were also received on 17 additional tracts that are claimed by both the United States and the U.S.S.R. See Minerals Management Service, Federal Offshore Statistics 14-15 (Sept. 1984). Interior is holding the 20% deposits associated with the bids on those tracts in escrow pending further discussions with the U.S.S.R. 49 Fed. Reg. 10058, 10065-66 (March 16, 1984).

cies Act (ESA), 16 U.S.C. § 1531, and the OCS Lands Act, 43 U.S.C. § 1331 (OCSLA), all showed that no stage of Navarin Basin operations would significantly restrict subsistence (A61-62); and

(2) As to Sale No. 57, Interior's explicit ANILCA evaluation (prepared after *Gambell I*) certified that no subsistence restrictions were likely during the leasing or exploration stages of the sale, but found that such restrictions could occur in the final production/development stage;[2] the court ruled that such a finding required compliance, at the leasing stage, with the notice, hearing and findings requirements of Section 810(a)(1)-(3). (A61).

Notwithstanding its findings on the merits, the district court denied plaintiffs' motions for injunctive relief on the ground that the balance of irreparable harm did not favor an injunction, that later operations on the OCS were subject to the Department's continuing supervisory authority which could be exercised to guard the subsistence interests protected by ANILCA, and that the public interest would be disserved by grant of the requested injunction. (A62-63).

Plaintiffs sought an emergency injunction pending appeal. On June 6, a Ninth Circuit motions panel (Sneed, Norris, Nelson, C.JJ.) denied that motion.[3]

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[2]*See generally Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), for a full exposition by this Court of the division of OCS projects into leasing, exploration and production stages.

[3]The motion panel conditioned its order on petitioners' submission of a "Hold Harmless Agreement" to compensate plaintiffs in the event that 1985 exploratory drilling caused any significant restriction of their subsistence uses of the OCS. Such an agreement was submitted on June 13, 1985, and was approved by the court with two revisions on June 21.

Petitioners thereafter conducted exploration in both the Norton Sound and Navarin Basin and have now terminated operations in both areas for the winter.

On October 25, a different panel of the Ninth Circuit (Alarcon, Praegerson, C.JJ.; Judge Dimmick, D.J., dissenting) reversed the district court and remanded with directions "to enter a preliminary injunction enjoining all activities in connection with Lease Sale 57 and Lease Sale 83 . . . ." *Gambell II*. (A47). The panel affirmed the district court's holding that plaintiffs were likely to establish a violation of Section 810 as to both sales, but held that the district court misapplied the law of the circuit by requiring plaintiffs to prove irreparable harm and by balancing the need for an injunction against the harm resulting from one. Instead of permitting the district court to employ these traditional equitable tests, the court ruled that proof of a "substantive procedural violation" of an environmental statute always entitles a plaintiff to an injunction (A36), unless it would do more environmental harm than good or unless it interferes with a narrow class of long-term government contracts (A40).[4]

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[4]Although 1985 operations are completed, the Ninth Circuit's ruling applies to those of future years. Moreover, the Ninth Circuit's rulings as to plaintiffs' right to injunctive relief and as to the construction of ANILCA are tantamount to final dispositions, which, unless reversed by this Court, will be binding on the merits. Thus, this is an appropriate case for review by this Court even though it arises on motions for preliminary injunctions. See *Walters* v. *National Association of Radiation Survivors*, ___ U.S. ___, 105 S. Ct. 3180 (1985); *Watt* v. *Energy Action Education Foundation*, 454 U.S. 151 (1981).

## REASONS FOR GRANTING THE WRIT

The issues presented for review by this case are of major importance to the enforcement of all federal environmental statutes in the Ninth Circuit and to the national OCS program. The Ninth Circuit's ruling that proof of a "substantive procedural violation" of an environmental statute *per se* justifies entry of an injunction will govern all cases in that circuit decided under numerous federal environmental statutes. As pointed out in the dissent below (A51), this Ninth Circuit rule is directly contrary to *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

The lower court's holding that ANILCA applies to OCS lease sales and requires elaborate hearings and modifications of OCS projects at the leasing stage of the project, even though no subsistence impacts will occur at that stage, imposes a severe burden on the OCS leasing program. The national impact of the lower court's rulings is shown by the fact that lands offshore Alaska comprise approximately 60 percent of the entire United States OCS[5] and are an essential part of the Interior Department's Five-Year OCS leasing schedule.[6]

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[5]*See* Minerals Management Service, Federal Offshore Statistics 28 (Table 6) (Sept. 1984).

[6]Of the 16 sales remaining on the current Five-Year OCS Oil and Gas Leasing Schedule, eight are offshore Alaska. *Id.* at 9. *See generally California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983), upholding the present schedule.

## I.

## THE NINTH CIRCUIT'S HOLDING THAT A "SUBSTANTIVE PROCEDURAL VIOLATION" OF AN ENVIRONMENTAL STATUTE *PER SE* MANDATES AN INJUNCTION CONFLICTS WITH THIS COURT'S DECISION IN *WEINBERGER* v. *ROMERO-BARCELO*.

The expansiveness of the Ninth Circuit's *per se* injunctive-relief rule is reflected by the *de minimis* nature of the "substantive procedural violation" of ANILCA found by the court below. In the Sale No. 83 case, the district court held that Interior had, in fact, evaluated the impacts on subsistence and other factors recited by Section 810(a) in complying with NEPA, OCSLA, and other statutes. (A61-62). The district court specifically found (A61-62), and the Ninth Circuit did not disagree, that Sale No. 83 would not significantly restrict subsistence uses. The sole ANILCA violation found by the district court and the court of appeals with respect to Sale No. 83 was that Interior did not have that statute's requirements "consciously in mind" at the time it performed analyses under other environmental statutes. (A31-34).

In this setting, the Ninth Circuit's holding that plaintiffs were entitled to an injunction against operations in the Sale No. 83 region makes clear that, in its view, any violation of an environmental statute, no matter how technical or trivial its consequences, requires an injunction. This view is clearly at variance with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

In *Weinberger*, this Court reversed a decision by the First Circuit that mandated issuance of an injunction due to the Navy's violation of the Clean

Water Act. The First Circuit had "concluded that the district court erred in undertaking a traditional balancing of the parties' competing interests." *Id.* at 310-11. After tracing the long history of federal equity practice and the requirements for showing irreparable injury and a traditional balancing of equities, this Court emphasized that "a major departure from the long tradition of equity practice should not be lightly implied." *Id.* at 320.

The Ninth Circuit in this case committed the same error as the First Circuit in *Weinberger*. Rejecting the district court's view that plaintiffs' inability to prove irreparable harm militated against issuance of an injunction in this case, the Ninth Circuit postulated that only two instances could arise in which a violation of an environmental statute would not require issuance of an injunction: if issuance of a preliminary injunction would result "in a belated interruption of long term contracts" (A37);[7] or if it would interfere with the protection of the environment (A40).

In stating this *per se* rule, the majority purported to distinguish *Weinberger* because it arose under the Clean Water Act, and "did not involve the tension between the requirements of [ANILCA] and [THE

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[7]The fact that the court's injunction would interrupt petitioners' enjoyment of the right to explore their leases under their long-term leasehold contracts with the federal government, as well as the exploration permits that the federal government had previously issued to them, did not dissuade the Ninth Circuit from reversing the district court. Thus, the "belated interruption of long-term contracts" exception articulated by the court of appeals to its *per se* rule is so narrow as to be virtually non-existant.

OCSLA]." (A42 n.2).[8] As Judge Dimmick pointed out in her dissenting opinion (A50-51), *Weinberger* cannot properly be reduced to these meaningless dimensions.

In *Weinberger*, this Court couched its decision in terms that govern all requests for injunctive relief in the federal courts, not merely those arising under the Clean Water Act:

> An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." . . . . The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies . . . .
>
> The grant of jurisdiction to insure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of

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[8]The Court also attempted to distinguish *Weinberger* as inapplicable because it involved an appeal from a final judgment after trial on the merits, rather than a request for preliminary relief. (A42 n.2). This distinction is misplaced for two reasons. First, the Ninth Circuit treated as final its resolution of the ANILCA issues in this case. Second, as the court below recognized (A28), courts of appeals are supposed to give greater deference to district court rulings on preliminary injunctions than to final judgments. Thus, the Ninth Circuit's *per se* rule, if applied to reverse a denial of preliminary relief, will *a fortiori* apply to denials of final relief.

law. . . .

456 U.S. at 312, 313 (citations omitted).[9]

The Ninth Circuit expressly recognized that "the D.C. Circuit Court apparently does not follow the Ninth Circuit rule that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances" (A37) (referring to *Alaska* v. *Andrus*, 580 F.2d 465 (D.C. Cir.), *vacated in part on other grounds as moot*, 439 U.S. 922 (1978)) The fact is, at least four other circuits also have explicitly followed *Weinberger* and have rejected the view that violation of an environmental statute automatically leads to an injunction. *See, e.g.*, *Wisconsin v. Weinberger*, 745 F.2d 412, 424, 427 (7th Cir. 1984); *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983); *United States* v. *Lambert*, 695 F.2d 536, 539 (11th Cir. 1983); *Sierra Club* v. *Hennessy*, 695 F.2d 643, 648-49 (2d Cir. 1982). To our knowledge, only the Ninth Circuit has sought to trivialize

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[9]That *Weinberger* stated principles applicable to litigation under NEPA and other environmental statutes, such as ANILCA, is revealed by earlier decisions of this Court. For example, in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-08 (1976), this Court reversed a court of appeals which had held that the " 'harm' justifying an injunction 'matured' whenever an impact statement [under NEPA] is due and not filed." Noting that the court of appeals had in fact found that there would be "no harm" arising from the mining operations challenged there, this Court concluded that

> [I]n simple equitable terms there were no grounds for the injunction: the District Court's finding of irreparable injury to the intervenors and to the public still stood, and there were—on the Court of Appeals' own terms—no countervailing equities. *Id.*

*Weinberger* by limiting its application to the Clean Water Act. Review by this Court is therefore essential, not only to require the Ninth Circuit to comply with this Court's *Weinberger* decision, but also to bring that Circuit into alignment with all others that have ruled on the question.[10]

## II.

## THE LOWER COURT INCORRECTLY APPLIED ANILCA TO THE LEASING OF OCS LANDS OFFSHORE ALASKA.

Section 810(a) applies only to "public lands," which are defined as lands "situated in Alaska," "the title to which is in the United States. . . ." ANILCA § 102(2), (3), 16 U.S.C. §§ 3102(2), (3). The Secretary

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[10]That the Ninth Circuit's disregard of *Weinberger* in *Gambell II* does not represent an isolated ruling is demonstrated by two subsequent decisions of that Court. In *The Steamboaters* v. *FERC*, No. 83-7444 (Dec. 5, 1985, Slip Op. at 2), the court (Sneed, Alarcon, Norris, C. JJ.) applied the "general rule" of "declin[ing] to enjoin action allegedly in violation of NEPA only where an injunction 'might actually jeopardize natural resources.' " Similarly, in *City of Tenakee Springs* v. *Block*, No. 84-3883 (Dec. 20, 1985, Slip Op. at 12), the court (Browning, Goodwin, Skopil, C.JJ.) referred to the presumption of irreparable injury based upon a NEPA violation in reversing the district court's denial of a motion for preliminary injunction. See also *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984), anticipating the *per se* rule articulated in *Gambell II*.

The Ninth Circuit's *per se* rule has recently been followed by the Alaska District Court, which enjoined an OCS lease sale because it was "without discretion" to deny plaintiffs a preliminary injunction after finding a probability of success on their ANILCA claims. *Village of Akutan* v. *Hodel*, No. A85-701 (D. Alaska, January 13, 1986, Slip Op. at 4), *appeal pending*, 9th Cir. No. 86-3512.

must "evaluate the effect of such [disposition] on subsistence uses and needs, the availability of other lands for the purpose sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." Section 810(a), 16 U.S.C. § 3120(a). If, but only if, such evaluation leads the agency to conclude that the disposition "would significantly restrict subsistence uses," the agency must give public notice of that fact, conduct hearings in or near the affected areas, and make specified findings that such restriction is "necessary," that the proposed activity will involve "the minimal amount of public lands necessary to accomplish" the agency's purpose, and that "reasonable steps will be taken to minimize adverse impacts upon subsistence. . . ." Section 810(a)(1)-(3), 16 U.S.C. § 3120(a)(1)-(3). *See Kunaknana v. Clark*, 742 F.2d 1145, 1150 (9th Cir. 1984).

In *Gambell I*, the Ninth Circuit held that the Department of the Interior must comply with Section 810(a) of ANILCA in offering federal OCS lands which lie three or more miles off Alaska but are allegedly close enough to shore to be used for subsistence. (A14). In *Gambell II*, it extended this holding to OCS lands, like those in the Navarin Basin, that are at least 250 miles off the Alaska mainland. (A27).

*Gambell I* applied ANILCA only to the extent of requiring a pre-sale evaluation of a project's possible impacts on subsistence. (A21). *Gambell II* holds that the notice, hearings, and findings requirements of Section 810(a)(1)-(3) must be complied with, at the leasing stage of an OCS project, if the ANILCA evaluation forecasts significant subsistence restrictions

when the exploration or development/production stage of projects is approved. (A34-35).[11]

Finally, *Gambell II* retroactively applied these rulings to a lease sale that was conducted a year earlier without litigation challenge, and mandated an injunction against exploration on these previously unchallenged leases. (A44).

Thus, the Ninth Circuit's construction of ANILCA in *Gambell II* creates a major obstacle to the congressional mandate for expeditious exploration and development of OCS resources, *see, e.g.*, 43 U.S.C. § 1332(3)(1); *Watt* v. *Energy Action Educational Foundation*, 454 U.S. at 154 n.2, and is in conflict with this Court's recognition that Congress designed the OCS process to avoid leasing-stage litigation over issues that might never arise, *Secretary of the Interior* v. *California*, 464 U.S. at 341 ("The stated reason for this four part division [of OCS projects] was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production.").[12]

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[11]See discussion at pp. 21-23, *infra*. In the ANILCA evaluation of OCS Lease Sale No. 57 conducted by the Department in compliance with *Gambell I*, the Department estimated that there was only a 13% chance that commercial quantities of oil and gas would be discovered in the Norton Sound (S.E.R. 91); if such discoveries were made, Interior speculated that there was a 75% chance of a 1000-barrel oil spill during the 20-year production stage (*id.* at 4).

[12]The potential disruption created by the Ninth Circuit's extension of ANILCA to OCS leasing is further illustrated by a recent construction of *Gambell II* as requiring leasing-stage

### A. The Ninth Circuit Erroneously Applied Section 810 of ANILCA to the OCS.

Section 810(a) of ANILCA applies only to "public lands." 16 U.S.C. § 3120(a). "Public lands" are defined as "lands situated in Alaska which. . . are Federal lands." 16 U.S.C. § 3102(3). "Federal lands" are defined, in turn, as "lands the title to which is in the United States . . . ." 16 U.S.C. § 3102(2). The OCS lies outside, not "in Alaska." Moreover, it does not constitute "lands the title to which is in the United States." Thus, Section 810 does not apply to the OCS.

The OCS is not located "in Alaska" in the common usage of that term. Any school child asked to identify Alaska on a map would point to its land mass, not the vast oceans that surround it. Moreover, the OCS, as defined in law,[13] lies beyond the three-mile limit which marks the outer bounds of Alaska's waters. *United States* v. *Maine,* 420 U.S. 515, 525 (1975); *Secretary of the Interior* v. *California,* 464 U.S. at 315-16. Thus, in applying ANILCA only to lands "in Alaska" Congress did not intend for it to extend to the OCS.

The legislative history of ANILCA supports this conclusion. Congressman Emery stated that "this legislation has nothing to do with" the OCS. 125 Cong. Rec. 11,170 (1979). Congressman Udall, the primary sponsor of ANILCA in the House, stated that

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compliance with the elaborate procedures of Section 810(a)(1)-(3) whenever there is any "possibility" or "threat" of significant subsistence restrictions at the ultimate development/production stage of an OCS project. *Village of Akutan* v. *Hodel,* at Slip Op. p. 3.

[13]Submerged Lands Act, 43 U.S.C. § 1301; OCSLA, 43 U.S.C. § 1331.

the bill would not affect offshore oil lands, which were instead regulated by "other legislation . . . which we all support, . . . good OCS legislation." 125 Cong. Rec. 11,128 (1979); *see also* 125 Cong. Rec. 9900 (1979) (remarks of Rep. Udall). Senator Stevens of Alaska emphasized the difference between lands in Alaska and lands on the OCS. 124 Cong. Rec. 19571-72 (1978).[14]

Just as it is clear that the OCS lies outside, not in, Alaska, it is also clear that the United States does not claim "title" to it, so that it is not "Federal lands" qualifying as "public land." In the 1953 OCSLA, Congress declared that "the subsoil and seabed of the [OCS] appertain to the United States and are subject to its jurisdiction, control, and power of disposition." 43 U.S.C. § 1332(1). "Appertain" means "to belong either as something appropriate or as a part, possession, right or attribute: PERTAIN. . . ." Webster's Third New International Dictionary. By contrast, "title" means "legal ownership"; having a right of "exclusive possession." *Id.* The OCS, like Wisconsin, "appertains" to the United States; the federal government holds "title" to neither.

That Congress' explicit refusal to assert federal "title" to the OCS in the OCSLA was deliberate is shown by its simultaneous vesting of "title" in the States to "lands beneath navigable waters" lying

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[14]The Ninth Circuit relied on scattered statements referring to the OCS as "in Alaska," as contrasted to the more precise phrase "offshore Alaska." *Gambell I* (A15). The court clearly erred in giving decisive weight to these offhand comments in the face of explicit disclaimers by sponsoring members of Congress that ANILCA would not apply to the OCS.

generally within three miles of the coast. See Submerged Lands Act, 43 U.S.C. § 1311(a):

> It is determined and declared to be in the public interest that (1) title to and ownership of lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are . . . recognized, confirmed, established, and vested in and assigned to the respective States. . . .[15]

Thus, States were recognized as having "title" to submerged lands within three miles of their coasts; the OCS, by contrast, merely "appertains" to the United States. See *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337-40 (5th Cir. 1978).[16]

In concluding that Title VIII of ANILCA applies to the OCS, the Ninth Circuit found "compelling" the argument (A15) that this statute should have the same geographic scope as the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1628,

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[15]43 U.S.C. § 1301(a)(2) defines "lands beneath navigable waters" as including "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line of three geographical miles distant from the coast line of each such State. . . ."

[16]The Truman Proclamation, through which the United States first asserted control over the OCS for purposes of mineral exploration, did not purport to assert title to it. 10 Fed. Reg. 12303 (Oct. 2, 1945), 59 Stat. 884. Moreover, the Convention on the Continental Shelf, ratified by the United States on March 24, 1961, 15 U.S.T. 471, TIAS 5578, indicates that sovereigns do not hold "title" to their respective outer continental shelves. It provides, Art. II, 1, only that "[t]he coastal State exercises

which it held extinguished all aboriginal title claims by Alaskan Natives to the OCS. The essential predicates for this argument are that, first, the terms of the two statutes are similar, and, second, that "the extinguishment of aboriginal rights" by ANCSA is sufficiently coincident with the provisions of ANILCA to have "made those measures [in ANILCA] necessary." Both propositions are flawed.

First, although the phrase "in Alaska" occurs in both statutes, the context in ANCSA is materially different from the one in ANILCA. ANCSA explicitly refers to "submerged land underneath all water areas, both inland and offshore." 43 U.S.C. § 1603(b). In ANILCA, Congress explicitly refused to make reference to offshore submerged lands on the OCS.[17]

Second, ANILCA is demonstrably not co-extensive with ANCSA. For example, ANCSA extinguished all Native title claims against "the United States, the State, and all other persons," 43 U.S.C. § 1603(c), whereas ANILCA Section 810 applies only to the disposition of lands to which the federal government

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over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." The distinction between "title" and such exploitation rights is important for a variety of reasons; *e.g.*, the waters overlying the OCS remain international waters, and other nations have important rights in them which limit the coastal state's right of exploiting the resources of the shelf itself. *See* Arts. III, IV, V.

[17]In addition, ANCSA extinguished not only all aboriginal title claims in Alaska, but also "all claims . . . that are *based on* claims of aboriginal . . . title . . . in Alaska" (emphasis added). Since the Natives' OCS claims were based on their alleged occupancy of the adjacent lands onshore in Alaska, this provision is properly construed as extending extinguishment beyond the boundaries of the state. 43 U.S.C. § 1603(c).

holds title. Moreover, ANCSA addressed claims of Alaskan Natives, whereas Title VIII's benefits extend to all "rural residents," Native and non-Native alike. 16 U.S.C. § 3101(c).

Finally, the federal defendants and intervenors in *Gambell I* demonstrated that plaintiffs could not properly claim aboriginal title to the federal OCS, since such claims were contrary to common,[18] constitutional,[19] and international law,[20] and to OCSLA.[21]

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[18]*See United States v. Holt State Bank*, 270 U.S. 49, 59 (1926) (rejecting aboriginal-title claim to the bed of a navigable lake).

[19]In the paramountcy cases, this Court held that "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." *United States* v. *California*, 332 U.S. 9, 38-39 (1947). *See also United States* v. *Texas*, 339 U.S. 707, 719 (1950); *United States* v. *Louisiana*, 339 U.S. 699, 705-06 (1950). Any exercise of aboriginal title is inconsistent with the federal "full dominion" over that area. The district court in *Gambell I* rejected plaintiffs' aboriginal-title claims on this ground, and thus found it unnecessary to reach the issue of extinguishment under ANCSA; *see also Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (decided by the Ninth Circuit as a companion case with *Gambell I*), *cert. denied*, 106 S.Ct. 68 (1985).

[20]*See, e.g.*, Convention on the Continental Shelf, Art. II, 1, done April 29, 1958, 15 U.S.T. 471, 473, T.I.A.S. 5578 ("The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources"); *id.* Art. II, 2 ("no one may undertake these activities, or make a claim to the continental shelf, without the *express* consent of the coastal state") (emphasis added).

[21]*See* 43 U.S.C. § 1332(3); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 n.7 (1981) (in the OCSLA, Congress intended "to retain exclusive federal control of the administration of the

In its zeal to expand ANILCA by making it symmetrical with a broad reading of ANCSA, the Ninth Circuit

> assum[ed] rather than decid[ed] that appellants had aboriginal title to hunt and fish in the waters of Norton Sound above the lands involved in the lease-sale. Since we conclude any such rights were extinguished by [ANCSA], we also do not decide whether they would be extinguished by the [OCSLA] as well." *Gambell I* (A3 n.1).

Thus, in *Gambell I* the Ninth Circuit begged the question that is essential to its holding; it assumed without deciding that ANCSA was necessary to extinguish the Natives' aboriginal title claims to OCS lands and then adopted an expansive reading of ANILCA based on that assumption.[22]

**B. The Lower Court's Decision Disregards the Distinct Stages of the OCS Leasing Process and Thus Conflicts with This Court's Decision in *Secretary of the Interior v. California*.**

Even if ANILCA applies to some part of the OCS offshore Alaska, the lower court misconstrued the requirements of that statute in the context of the OCS

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Shelf because it underlay the high seas and the assertion of sovereignty there implicated the foreign policies of the Nation").

[22]In *Gambell II*, the Ninth Circuit begged a related question: *Gambell I* involved lands in the Norton Sound which were alleged by plaintiffs to be actually used for subsistence. Accordingly, plaintiffs there asserted aboriginal title to these submerged lands by virtue of their historic use of them. *Gambell II* involves not only the Norton Sound tracts leased in Sale No. 57, but also those leased in Sale No. 83, whose lands lie in the remote Navarin Basin, which plaintiffs neither used for subsistence nor

leasing program. In addressing the adequacy of the ANILCA evaluation for Sale No. 57, which the Department prepared in an attempt to comply with *Gambell I*, the Ninth Circuit read ANILCA as requiring, at the leasing stage, compliance with the notice, hearing, and findings procedures of Section 810(a)(1)-(3), if subsistence could be significantly restricted at the much later development/production stage. (A34-35).

The holding that all possible impacts on subsistence at any stage of OCS operations must be the subject of the procedures referred to in Section 810(a)(1)-(3), prior to a lease sale, is inconsistent with *Secretary of the Interior* v. *California*, 464 U.S. 312. There, this Court reversed the Ninth Circuit's similar holding that Interior was required to comply with Section 307(c)(1) of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456(c)(1), prior to an OCS lease sale, if coastal-zone impacts might occur at the later exploration or development/production stage. In doing so, the Court relied heavily on the existence of "four distinct statutory stages to developing an offshore oil well: (1) formulation of a five year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; and (4) development and production." 464 U.S. at 337. This staged approach is one that "Congress has codified with great

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claimed by aboriginal title. Petitioners argued, therefore, that, even assuming that ANILCA is co-extensive with ANCSA, it should not extend to the Navarin Basin, since ANCSA did not extinguish title to such lands. The Ninth Circuit simply ignored that argument and adopted the most expansive possible construction of the term "in Alaska" as used in ANILCA by applying that statute to all federal OCS lands which happen to be nearer Alaska than to any other state.

care." *Id.* at 336. "Each stage involves separate regulatory review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS." *Id.* at 337.

When that rationale is applied here, it follows that no hearings or findings under ANILCA should be required unless the particular "disposition" of lands at issue threatens subsistence restrictions. Leasing itself causes no such restrictions. Development/production-stage impacts can be ascertained and mitigated pursuant to ANILCA procedures if and when exploration locates reserves and plans are formulated to produce oil or gas.[23]

### C. The Ninth Circuit's Construction of ANILCA Should Not Apply Retroactively.

The Ninth Circuit's retroactive application of its construction of ANILCA raises a substantial question that merits review by this Court. *See Gambell II* (A45). In *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), this Court declined to apply retroactively a new construction of OCSLA and set forth a three-part test to explain its action. That test shows that ANILCA should not be applied retroactively to lease sales conducted prior to *Gambell I.*

To be denied retroactive effect, the decision "must establish a new principle of law . . . by deciding an

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[23]The majority below distinguished *Secretary of the Interior* v. *California* on the ground that it related to the CZMA, not to ANILCA (A35-35). However, this Court found that the four stages of the OCS process were created by OCSLA, not by CZMA, and held that the creation of those distinct stages must be considered in interpreting and applying the CZMA.

issue of first impression whose resolution was not clearly foreshadowed. . . ." 404 U.S. at 106. The Department of the Interior had consistently interpreted ANILCA as not applying to OCS activities. *See* 43 C.F.R. § 1601.0-5(i). No one had argued otherwise until the complaint in *Gambell I*, and both the district court and the Ninth Circuit's motions panel in that case had rejected the theory underlying that complaint. Thus, the Ninth Circuit's *Gambell I* declaration in November 1984 that the OCS lies "in Alaska" was neither clearly nor even opaquely foreshadowed.

Second, the court must determine whether retroactive operation of the new decision "will further or retard [the statute's] operation." 404 U.S. at 107. The district court found, and the court of appeals did not disagree, that subsistence could be fully protected by applying ANILCA to any post-leasing-stage activities which threatened subsistence, rather than to OCS leases already issued. (A62-63). Thus, the retroactive application of *Gambell I* declared in *Gambell II* is not necessary to further ANILCA's operation.

Third and finally, the court must weigh "the inequity caused by retroactive application." 404 U.S. at 107. Here, grave inequities could be done by applying ANILCA to prior OCS sales. Seven OCS lease sales were held offshore Alaska between ANILCA's enactment and the Ninth Circuit's decision in *Gambell I*, with petitioners and numerous other companies paying more than $4,000,000,000 to acquire leases.[24] Hundreds of millions more have been spent for ex-

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[24]*See* Federal Offshore Statistics, *supra*, at 12-15.

ploration of these OCS tracts.[25] Retroactive application of ANILCA to past sales to void the leases, as plaintiffs here have requested, would impose staggering financial losses on petitioners and others who could not reasonably foresee ANILCA's application to all OCS lands off Alaska. Plaintiffs threaten comparable damage to the public interest by seeking to bring Alaska OCS activities to a halt pending compliance with ANILCA.[26]

Thus, even if ANILCA applies to the OCS offshore Alaska, the statute should not apply to leases issued prior to *Gambell I*.

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[25]As noted above, p. 5, $60 million had been committed for 1985 exploration in the Navarin Basin alone prior to the commencement of operations.

[26]Following *Huson*, this Court has denied retroactive effect to new constructions of statutes in comparable circumstances, where there would have been serious disruption of financial arrangements made in reliance upon a prior construction of the statute. *See City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702, 719-20 (1978); *see also Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073, 1075 (1983); *id.* at 1105-07 (opinion of the Court per Powell, J.); *id.* at 1109-11 (O'Connor, J., concurring).

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari and entertain full briefing and argument.

Respectfully submitted,

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January 1986

# APPENDIX

# APPENDIX A

## UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

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## Nos. 83-3735X, 83-3781.

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The People Of the Village of Gambell, an Alaskan Native IRA Association, and the People of the Village of Stebbins, an Alaskan Native IRA Association,
*Plaintiffs-Appellants,*

v.

William Clark*; Secretary of the Interior and the United States Department of Interior,
*Defendants-Appellees*

and

Arco Alaska, Inc., *et al.*,
*Defendants-Appellees.*

Argued and Submitted Oct. 7, 1983.
Decided Nov. 2, 1984.

Alaskan natives brought action against the Secretary of Interior to enjoin sale of oil and gas exploration leases for shelf lands in the Norton Sound basin off the western shore of Alaska. The United States District Court for the District of Alaska, James A. von der Heydt, J., granted the Secretary's motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Browning, Chief Judge, held that: (1) if plaintiffs had an exclusive aboriginal right to hunt and fish in off-shore areas adjacent to Alaska, that right was extinguished by the Alaskan Native Claims Settlement Act, but (2) the Alaska National Interest Land Conservation Act applied to outer continental shelf lands and waters.

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*William Clark is substituted for James G. Watt as Secretary of the Interior pursuant to Fed.R.App.P. 43(c).

Affirmed in part, reversed in part, and remanded.

Donald Cooper, Anchorage, Alaska, for plaintiffs-appellants.

David C. Shilton, Dept. of Justice, Brice M. Clagett, Covington & Burling, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before BROWNING, Chief Judge, HUG, Circuit Judge, and REED**, District Judge.

BROWNING, Chief Judge:

The appellee Secretary of Interior offered to sell leases for about 2.4 million acres of land in the Norton Sound Basin off the western shore of Alaska for oil and gas exploration under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331-1356. Appellee oil companies submitted bids for these leases. Appellants, the People of the Village of Gambell and the People of the Village of Stebbins (Alaska Native Indian Reorganization Act Associations composed of residents of two towns on Norton Sound) brought this action to enjoin the sale. The district court denied appellants' motion for preliminary injunction and granted the Secretary's motion for summary judgment. This appeal followed.

Appellants argue that oil and gas development without their consent is barred because it will adversely affect their aboriginal right to subsistence hunting and fishing. Alternatively, they content the lease sale failed to satisfy the procedural requirements of section 810 of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3120, providing special protections for subsistence uses in Alaska.

The district court held that neither appellants' aboriginal hunting and fishing right nor section 810 of the Conser-

**Honorable Edward C. Reed, Jr., United States District Judge, District of Nevada, sitting by designation.

vation Act extend to waters over the outer continental shelf outside the territorial boundaries of the State of Alaska.

We hold that if appellants had an exclusive aboriginal right to hunt and fish in offshore areas adjacent to Alaska, that right was extinguished by the Alaskan Native Claims Settlement Act (Claims Settlement Act), 43 U.S.C. §§ 1601-1628.[1] We further hold, however, that section 810 of the Conservation Act does apply to outer continental shelf waters in Norton Sound, and remand to the district court for determination of the proper remedy.

## I.

Appellants argue that oil and gas exploration and development in Norton Sound conflicts with their asserted aboriginal right to hunt and fish in these waters and concomitant right to the minerals of the outer continental shelf underlying the Sound.

Aboriginal title or right is a right of exclusive use and occupancy held by Natives in lands and waters used by them and their ancestors prior to the assertion of sovereignty over such areas by the United States. These rights are superior to those of third parties, including the states, but are subject to the paramount powers of Congress. *See Oneida Indian Nation v. County of Oneida,* 4414 U.S. 661, 667-69, 94 S.Ct. 772, 777-78, 39 L.Ed.2d 73 (1974); *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345, 62 S.Ct. 248, 251, 86 L.Ed 260 (1941). Aboriginal rights based on occupation and use are entitled to the protection of federal law even when they are not formally recognized as ownership by treaty or statute, *Santa Fe,* 314 U.S. at 347, 62 S.Ct. at 252, but such unrecognized aboriginal

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[1]We assume rather than deciding that appellants had an aboriginal right to hunt and fish in the waters of Norton Sound above the lands involved in the lease-sale. Since we conclude any such rights were extinguished by the Claims Settlement Act, we also do not decide whether they would be extinguished by the Outer Continental Shelf Lands Act as well.

rights can be extinguished by Congress without compensation. *See Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279-85, 288-89, 75 S.Ct. 313, 317-20, 321-22, 99 L.Ed. 314 (1955); *United States v. Dann,* 706 F.2d 919, 922 n. 1 (9th Cir. 1983), *cert. granted,* ___ U.S. ___, 104 S.Ct. 2693, 81 L.Ed.2d 362 (1984); *Wahkiakum Band v. Bateman,* 655 F.2d 176, 180 (9th Cir. 1981); *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134 (9th Cir.1980). Congress's intention to extinguish must be clear; it will not be lightly implied. *See United States v. Santa Fe Pacific R.R. Co.,* 314 U.S. 339, 354, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941); *United States v. Dann,* 706 F.2d at 928-29; *United States v. Gemmill,* 535 F.2d 1145, 1147 (9th Cir.1976)

Appellees argue the Claims Settlement Act extinguished whatever aboriginal rights the Natives may have held in Norton Sound. The Claims Settlement Act arose out of a series of events beginning with passage of the Alaska Statehood Act in 1958. When Alaska became a state, nearly all its territory was federal land. The Statehood Act granted the new state the right to select over 100 million acres for state ownership. However, the state agreed by section 4 of the act to "disclaim all right and title . . . to any lands or other property (including fishing rights) [of Alaska Natives] . . . ." Pub.L. 85-508, 72 Stat. 339, 339 (1958). The state selected large areas of federal land and made application for patents for the land. The Natives claimed aboriginal title to much of the same territory. The discovery of oil on the North Slope in the 1960's exacerbated this conflict. These conflicting claims hindered both development and protection of Native and national interests in Alaska. In 1966 Secretary of Interior Stewart Udall "froze" all public land transactions in Alaska pending resolution of the conflicting claims. In 1971 Congress passed the Claims Settlement Act in an effort to accommodate in a rational manner the interests of the state, Native groups, conservationists, and potential developers, including the oil companies. *See generally,* H.R.Rep. No. 1045,

95th Cong., 2d Sess., pt. I at 188-89 (1978); S.Rep. No. 405, 92d Cong., 1st Sess., pt. I at 71-78 (1971).

The heart of the Claims Settlement Act was the extinguishment of Native claims based on aboriginal right in return for a grant to the Natives of $962,500,000 and 40,000,000 acres of land. *United States v. Atlantic Richfield,* 612 F.2d 1132, 1134 (9th Cir.1980). Unquestionably it was the purpose of the Claims Settlement Act to extinguish the aboriginal claims of Alaska Natives.[2] The question is whether the extinguishment provision applies to lands on the outer continental shelf adjacent to the Alaskan land mass and to waters over such lands.

Our inquiry begins with the statutory language. The critical language is found in Section 4(b) of the Act, 43 U.S.C. § 1603(b):

> All aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished. (emphasis added).

The statute also states: "there is an immediate need for a fair and just settlement of all claims by Natives . . . based on aboriginal land claims," and "the settlement should be accomplished rapidly, with certainty, [and] . . . without litigation . . . ." 43 U.S.C. § 1601(a), (b).

The argument that aboriginal title in outer continental shelf lands and waters is not extinguished rests entirely upon use in section 4(b) of the phrase "in Alaska" to identify the location of the titles and claims of title to be extinguished.

We believe Congress used the phrase "in Alaska" in this context to mean the geographic region, including the

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[2] "Native" is defined in the Act as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof." 43 U.S.C. § 1602(b).

contiguous continental shelf and the waters above it, and not merely the area within the strict legal boundaries of the State of Alaska. This is not an uncommon usage. Indeed, the Norton Sound, at issue here, is described in *Webster's New Geographical Dictionary* (1972 ed.) as a "large inlet of NE Bering Sea, *in W Alaska* . . ." (emphasis added). As indicated in Part II of this opinion, nine years later, when Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (Conservation Act), to complete the land allocation process initiated by the Statehood and Claims Settlement Acts, Congress used the words "in Alaska" to refer to areas of the outer continental shelf. Section 1001 of the Conservation Act, 16 U.S.C. § 3141, refers to "all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska . . . ." During debates on the Conservation Act, the phrase "in Alaska" was used on numerous occasions to include the outer continental shelf. *See e.g.*, 125 Cong.Rec. 9900, 11,125 (1979) (statements of Rep. Udall); *id.* at 9907 (statement of Rep. Young).

The possibility of two meanings of the phrase "in Alaska" renders the provision ambiguous, justifying reference to the legislative history. That history makes it clear that Congress intended to extinguish aboriginal fishing and hunting rights in outer continental shelf waters contiguous to the State of Alaska.

Congress repeatedly enjoined those who were to implement the statute to interpret the extinguishment section broadly to accomplish a complete and final settlement of aboriginal claims and avoid further litigation of such claims.[3] Claims of aboriginal title to submerged lands, both

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[3]Relevant statements from the legislative history are quoted in *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1136 (9th Cir.1980):

The House report stated,

> "Section 4 extinguishes all aboriginal titles in Alaska, and all claims based thereon,

and

> The section extinguishing aboriginal titles and claims based on

inland and offshore, were expressly included in the extinguishment provision, as were "any aboriginal hunting or fishing rights." The needs of the Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives, *see, e.g.,* H.R.Rep. No. 523, 92nd Cong., 1st Sess. 5, *reprinted in* 1971 U.S. Code Cong. & Ad.News 2192, 2195; the land was granted, in part, "in lieu of subsistence hunting and fishing rights," 117 Cong.Rec. 36864 (1971) (Rep. McClure).[4]

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aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title."

H.R.Rep. No. 523, 92d Cong., 1st Sess. 6, 8 *reprinted in* [1971] U.S.Code Cong. & Ad.News 2196, 2198. The Senate report stated that the objective of the legislation was to avoid

"a myriad of lawsuits which cannot provide justice to any of the parties involved but which may be expected to increase the existing antagonisms between Native people and other Alaskans."

S.Rep. No. 405, 92d Cong., 1st Sess. 73 (1971).

The Conference Committee report[3] stated,

"It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska."

Conf.Rep. No. 40, *reprinted in* [1971] U.S.Code Cong. & Ad.News 2253 (emphasis in original).

The statements of former Justice Arthur Goldberg, attorney for the Alaska Federation of Natives, before Congress in 1969 also support the district court's conclusion. Goldberg, under questioning by Senator Stevens of Alaska, said, "The position that the Natives have taken is they they are prepared for an extinguishment of anything that is based upon aboriginal title." *Alaska Native Land Claims: Hearings on S. 1830 Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 300-10 (1969).

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[3]The House and Senate Conference Reports are identical. S.Conf.Rep. No. 481, 92d Cong., 1st Sess. (1971); H.R.Conf.Rep. No. 746, 92d Cong., 1st Sess. (1971) [Hereinafter cited as Conf.Rep.]

[4]Rep. McClure, a member of the Committee on Interior and Insular Affairs, stated:

. . . The settlement of this acreage of land is in lieu of other rights,

Appellants' claim of aboriginal title rests upon immemorial use for hunting and fishing extending far to sea. They assert:

> Factually, no aboriginal group has ever used water and ice as intensely as have the Eskimos. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, and during this period the Eskimos treat the ice as a mere extension of the land. They set up camps on the ice. They build roads on it. And, most importantly, they hunt and fish on it. R. Nelson, *Hunters of the Northern Ice* (1969). . . . Eskimos have relied on the sea to provide them with most of their necessities. They have relied on the oceans to provide them with food, clothing, fuel, and the basic material for making hunting equipment such as kayaks and harpoons. *Id.;* N. Chance,*The Eskimo of North Alaska* 9 (1966).
>
> Because ice areas are not physically different from land during long periods of the year, and because Eskimos have generally relied on the oceans for most of their food, fuel, and clothing, they have not traditionally recognized sharp distinctions between land and water. Simply stated, the sea is so central to the life of an Eskimo that s/he recognizes no distinctions

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and the bill in specific terms removes hunting and fishing rights. The subsistence lands that may be selected, after the village lands are selected and after the statehood lands are selected, are in lieu of subsistence hunting and fishing rights, and the only hunting and fishing rights they will have are in connection with whatever lands are selected by them under the provisions of the bill.

* * * * * *

. . . The rights for hunting and fishing will be not rights, but whatever is granted to them as a matter of charity or a matter of generosity on the part of the State or the Federal Government. I think we should know that is one of the reasons why the acreage that is granted is as large as it is.

Appellants are two of the villages qualified by section 1610(b) of the Act to receive land benefits under section 1613(a) and (b).

> between the two. . . . K. Josephson, *Alaska and the Law of the Sea: Use of the Sea by Alaskan Natives—A Historical Perspective,* 91 (1974).

Appellants' Opening Brief 27-8. Appellees do not dispute this assertion.

The Final Environmental Impact Statement (FEIS) for the Norton Sound lease sale describes the subsistence way of life as a "continuation of traditional patterns continuous for several centuries." United States Department of Interior, Final Environmental Impact Statement, OCS Proposed Oil & Gas Lease Sale Norton Sound 47 (1982). *See also id.* at xii (subsistence activities "passed on through countless generations."). The Natives' dependence on hunting, whaling, and fishing extending 20-30 miles off shore is described in detail for each of the affected villages. *Id.* at 47-53 & Graphics 2A, 2B, 2C.

Congress could not have been unaware of such widely known facts of Native Alaskan life and appellants do not argue to the contrary. Mr. Eben Hopson, a witness from Point Barrow, Alaska, reminded the senate Interior and Insular Affairs Committee: "As far as hunting on the sea is concerned that is continually being used on a year around basis by the Eskimo people, and the same holds true wherever you find an Eskimo village along the coast." *Alaska Native Land Claims: Hearings on S.1830 Before Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess., pt. II at 335 (1969) [hereinafter *Senate Hearings 1969*]. *See also Alaska Native Land Claims: Hearings on H.R. 13142, H.R. 10193 and H.R. 14212 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess., pt. II at 401-02 (1969) [hereinafter *House Hearings 1969*]; *Alaska Native Land Claims: Hearings on S.35, S. 835 and S. 1571 Before the Senate Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess., pt. I at 168, 345 (1971) [hereinafter *Senate Hearings 1971*].

Aboriginal fishing and hunting rights are precisely the kind of rights Congress wished to extinguish. Nothing in the legislative history suggests that Congress intended to

extinguish such rights in ocean waters within three miles of land but preserve them in the waters beyond. On the contrary, the only directly pertinent legislative material strongly suggests Congress intended to extinguish aboriginal fishing rights in outer continental shelf waters as well.

Early versions of the Act contained no reference to either offshore lands or fishing and hunting rights. *See* S. 2906, 90th Cong.2d Sess. § 501 (1968) (extinguishing "all claims against the United States based upon aboriginal right, title, use, or occupancy of lands in Alaska . . . ."); S. 1830, 91st Cong., 1st Sess. § 3(a) (1969) (similar language). During Senate hearings in 1969 John Pickering, representative of the Western Oil and Gas Association, pointed out that some of the Native claims "purport to cover waters in addition to land areas" and "to effectuate a complete settlement, the claims should be extinguished as to water, as well as to land, areas." Mr. Pickering suggested this was true "for submerged areas beneath navigable waters in particular," and identified these as including "submerged areas beneath navigable waters [title over which was vested] in the State of Alaska under the grant made to it by the Submerged Lands Act (67 Stat. 29) as made applicable by the Statehood Act (72 Stat. 343), *or in the United States under the Outer Continental Shelf Lands Act* (67 Stat. 462)." *See Senate Hearings 1969, supra,* pt. I at 140, 144, 149 (emphasis added). "In view of this," Mr. Pickering stated, "it would be unfortunate if the legislation overlooked settling the Native claims to waters and thereby left open the possibility that such claims might be asserted to water areas in the future." *Id.* at 144. To include such areas, Mr. Pickering suggested the extinguishment provision be amended to apply to claims based on use or occupancy not only of lands but also of "waters, and submerged areas in Alaska." *See id.* at 149. The State of Alaska recommended the same language. *See id.*, pt. II at 241. The present language of Section 4 ("including submerged lands underneath all water areas both inland and offshore") was inserted in Senate bills following this hearing.

These events strongly suggest that the reference to "submerged lands" was intended to include lands on the outer continental shelf contiguous to Alaska, and that the general reference to Alaska (as distinguished from the State of Alaska) was not regarded as confining the reach of the extinguishment provision to the three-mile limit.

The express reference in Section 4(b) to "aboriginal hunting or fishing rights" probably also had its genesis in the hearings before the 91st Congress. Arthur J. Goldberg, former Justice of the Supreme Court, appeared before the Senate Committee on behalf of the Alaska Federation of Natives, principal representative of the Natives before Congress. Senator Stevens of Alaska asked Mr. Goldberg whether the Natives agreed that aboriginal fishing and hunting rights should be extinguished. After a rather confusing exchange Senator Stevens said:

> [W]e are talking about a bill to settle the property claims of the Alaska Native people, not just the land claims, a bill to settle the property rights, including land, and I hope that this bill will be viewed in that manner because I would not want to have to come back here a few years from now and try to get a bill to settle the nonland property claims.

*Senate Hearings 1969, supra,* pt. II at 299-301.

Mr. Goldberg replied:

> The position that the Natives have taken is that they are prepared for an extinguishment of anything that is based upon aboriginal title.

*Id.* at 301. The Alaska Federation of Natives further clarified Mr. Goldberg's response in a supplemental statement which agreed that the settlement should extend to all claims "founded upon aboriginal title or use and occupancy of lands, including claims relative to fishing rights. . . ." *Id.*

During these same hearings, the National Wildlife Federation suggested the bill be strengthened by adding "in-

cluding any aboriginal hunting or fishing rights that may exist" to the extinguishment provision. *Id.* at 526. This phrase was added without change to the Senate bill and eventually included in the version of the act adopted by Congress.

These witnesses presented similar testimony before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs. The representatives of the Alaska Federation of Natives (AFN) reiterated their view that the act should be a "full and final extinguishment of any and all claims against the United States based upon aboriginal right . . . ." *See House Hearings 1969,* Pt. I, *supra,* at 52. *See also id.* at 265-68. The Governor of the State of Alaska and the representatives of the Western Oil and Gas Association repeated their urgings that the extinguishment section address claims to waters and submerged areas. *See id.* at 138, 154, 310, 312-13, 318. And the National Wildlife Federation recommended to the House Committee addition of the identical phrase to cover aboriginal hunting and fishing rights that it suggested to the Senate Committee. *Id.* at 292.

No legislation passed the 91st Congress, but bills introduced in the 92d Congress reflected this testimony. At least one Senate bill specifically extinguished claims to offshore areas and hunting and fishing rights with language essentially identical to the present section 4(b). *See* S. 35, 92d Cong., 1st Sess. § 4(a) (1971). Similar language in a House bill referred to "alleged aboriginal hunting and fishing rights that may exist." *See* H.R. 3100, 92d Cong., 1st Sess. § 3(b) (1971).

Only brief hearings were conducted by the House and Senate committees on these and other bills in 1971. Representatives of the Western Oil and Gas Association urged the Senate and House to approve bills with extinguishment sections referring to water, offshore areas, and hunting and fishing rights and criticized bills that failed to include specific language extinguishing such claims. *See Senate Hearings 1971 supra,* pt. II at 578, 581, 583; *Alaska Native*

*Land Claims: Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 353, 354, 356-57 (1971) [hereinafter *House Hearings 1971*]. The AFN explained before the Senate Committee that its position "on the major provisions of the settlement, as well as most of the details, remains virtually the same as it was in our prior appearances before this committee." *Senate Hearings 1971, supra*, pt. I at 306. The National Wildlife Federation stated again its belief that the settlement should extend to "hunting, fishing, and trapping rights." *Id.* at 386. *See also House Hearings 1971, supra*, at 342.

The Senate passed a bill containing an extinguishment section referring to offshore submerged lands and to hunting and fishing rights. Submerged offshore areas were not specifically extinguished in the House-passed bill, but aboriginal hunting and fishing rights were. The conference committee adopted the broader and more explicit language of the Senate bill, stating the language was "in substance, the same as the language of the Senate amendment." H.Conf.Rep. No. 746, 92d Cong., 1st Sess., 40, *reprinted in* 1971 U.S.Code Cong. & Ad. News, 2247, 2253.

This summary of the history of section 4(b) demonstrates that Congress chose to adopt broad language to extinguish all claims made by Alaska Natives based upon aboriginal right, specifically including claims to hunting and fishing rights in offshore waters above the outer continental shelf.

Based upon the language of section 4(b) of the Claims Settlement Act, taken as a whole, the mandate from Congress to construe the provision broadly to extinguish all aboriginal claims, and the legislative history indicating a specific purpose to extinguish aboriginal hunting and fishing rights, including those in coastal waters, and specifically in outer-continental-shelf waters, we conclude that appellants' claims to an aboriginal right to hunt and fish in Norton Sound were extinguished.

## II.

We turn to appellants' contention that the lease sale failed to satisfy the procedural requirements of section 810 of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3120, a claim rejected by the district court on the ground that this statutory provision does not apply to the outer continental shelf.

Title VIII of the Conservation Act, of which section 810 is a part, seeks to preserve the opportunity of rural residents of Alaska to take fish and wildlife for their subsistence. As one means of furthering this purpose, section 810 provides that in determining whether to lease or otherwise permit the disposition of public lands the head of the federal agency having primary jurisdiction of such lands shall evaluate the effect of the proposed action on subsistence uses. No action is to be taken which would significantly restrict subsistence uses unless the head of the agency first satisfies certain procedural conditions, including notice and hearing, and determines that the proposed restriction of subsistence uses is necessary, that the minimal amount of "public lands" are involved, and that reasonable steps have been taken to minimize the adverse impact on subsistence uses.

Section 810 applies to "public lands." The term "land" is defined as "land, waters, and interests therein." Section 102 (1), 16 U.S.C. § 3102(1). The term "public lands" is defined as "land situated *in Alaska.*" Section 102(3), 16 U.S.C. § 3102(3) (emphasis added). As in the construction of the Claims Settlement Act,the question in construing the Conservation Act is whether the limitation "in Alaska" in this definition of "public lands" excludes the outer continental shelf and its covering waters. Our conclusion is the same under both statutes: outer continental shelf lands and water contiguous to the State of Alaska are included.

As we have said, a geographic term such as "in Alaska" may be used in either a general or technical sense, and reference to the legislative history to resolve the ambiguity

is appropriate. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918).

During the House debates the term "in Alaska" was used in its general sense. Representative Morris K. Udall, Chairman of the House Committee on Interior and Insular Affairs, and manager of the bill on the floor, referred to outer continental shelf lands as "in Alaska." 125 Cong.Rec. 9900, 11,128 (1979). So too did Representative Don Young of Alaska, a member of both the Interior Committee and the Subcommittee on General Oversight and Alaska Lands. *See id.* at 9907. Other congressmen referred to "Alaska's" oil resources in terms that necessarily included oil reserves beneath the outer continental shelf. *See id.* at 11,174 (Rep. Huckaby); *id.* at 9893 (Rep. Vento).

In addition to this support for a nontechnical usage of the phrase "in Alaska" to include the outer continental shelf lands and waters, the record of legislative consideration of the Conservation Act contains convincing evidence that Congress intended to include these areas within the reach of section 810.

Appellants make a compelling argument that the provisions of Title VIII of the Conservation Act protecting subsistence uses were intended to have the same territorial scope as provisions of the earlier Claims Settlement Act extinguishing Native hunting and fishing rights. The two statutory provisions are clearly related. When Congress adopted the Claims Settlement Act it was aware that extinguishing Native rights might threaten subsistence hunting and fishing by Alaska Natives. The Senate version of the Claims Act included provisions directing the Secretary to protect subsistence uses on public lands. The Conference Committee eliminated this provision, but the Committee made it clear that it did so only because it concluded subsistence resources should be protected by the Secretary of Interior through the exercise of existing administrative authority. The Committee wrote: "The Conference Committee expects both the Secretary and the State to take

any action necessary to protect the subsistence needs of the Natives." *See* H.Conf.Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad.News 2247, 2250. Title VIII of the Conservation Act was enacted because the Secretary and the state failed to heed Congress's admonition. *See* S.Rep. No. 413, 96th Cong., 1st Sess. 230-31, *reprinted in* 1980 U.S.Code Cong. & Ad.News, 5070, 5174-75; S.Rep. No. 1300, 95th Cong., 2d Sess. 195-96 (1978); H.R. Rep.No. 1045, 95th Cong., 2d Sess., pt. I at 183-84 (1978); 126 Cong.Rec. 29278 (1980) (Cong. Udall); 125 Cong.Rec. 9904 (1979) (Cong. Udall). It is a reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of the Conservation Act to be coextensive with the extinguishment of aboriginal rights that made those measures necessary.

Congress's intention to protect subsistence uses by rural residents of Alaska is repeatedly and strongly stated in the statute itself. It was a stated general purpose of the Conservation Act "to provide the opportunity for rural residents engaged in a subsistence way of life to continue do to so." Section 101(c), 16 U.S.C. § 3101(c). Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife "is essential to [their] existence." Section 801(1), 16 U.S.C. § 3111(1). Congress further found that "to fulfill the policies and purposes of the [Claims Settlement Act] and as a matter of equity, it is necessary . . . to protect and provide the opportunity for continued subsistence uses on the public lands. . . ." Section 801(4), 16 U.S.C. § 3111(4). It is Congress's stated policy that "utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands. . . ." Section 802(1), 16 U.S.C. § 3112(1). The stated purpose of Title VIII in particular "is to provide the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.*

Congressional reports and debates echo these views.[5] It is clear Congress's concern included all rural Alaskans,[6] and, as we have seen, reliance by coastal villagers upon hunting and fishing in waters and on the ice over the outer continental shelf was well known.[7] In strikingly similar circumstances, the Supreme Court has twice given an expansive and non-technical interpretation to geographical terms to achieve Congress's apparent purpose to protect native fisheries. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 110-16, 69 S.Ct. 968, 982-86, 93 L.Ed. 1231 (1949); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct 40, 42, 63 L.Ed. 138 (1918).

There are other indications of a Congressional intent that section 810 apply to outer continental shelf waters. For example, as originally proposed the subsistence provisions applied only to lands in conservation units established by what are now Titles II through VII of the Conservation Act. *See* H.R. 39, § 701(a), (b), 95th Cong., 1st Sess. (1977). The boundaries of these units were fixed by maps to be approved with the legislation, *see id.* § 1(c), and generally would not have included outer continental

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[5]*See, e.g.*, S.Rep. No. 413, 96th Cong., 1st Sess. 230-33, 267-68, *reprinted in* 1980 U.S. CodeCong. & Ad.News 5070, 5174-77, 5211-12; S.Rep. No. 1300, 95th Cong., 2d Sess. 195-96 (1978); H.R.Rep. No. 1045, Pt. I., 95th Cong., 2d Sess. 181-84, 187 (1978); 126 Cong.Rec. 29,278 (1980); 125 Cong.Rec. 9904-05 (1979).

[6]*See* S.Rep. No. 413, 96th Cong., 1st Sess. 268-69, *reprinted in* 1980 U.S.Code Cong. & Ad.News 5070, 5212-13; S.Rep. No. 1300, 95th Cong., 2d Sess. 220 (1978); 126 Cong.Rec. 29278-79 (Cong. Udall).

[7]See pp. 6-8, *supra*. *See also Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems, Hearings on H.R. 39, H.R. 1974, H.R. 2876, H.R. 5505, et al., H.R. 1454, H.R. 5605, & H.R. 8651*, Before the Subcommittee on General Oversight and Alaska Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess., pt. XIII at 468, 484, 487, 510-528 (1977) (report discussing Arctic Slope subsistence uses of resources of the ocean and sea ice).

shelf areas. In the course of legislative proceedings, the coverage of Title VIII was extended beyond the boundaries of the conservation units to include all public lands in Alaska. *See* 16 U.S.C. §§ 3102(3), 3111, 3112. The boundaries of conservation units remained tied to maps, as they are in the Act as passed. *See* 16 U.S.C. § 3103(a). At the same time, Congress amended the savings clause, 16 U.S.C. § 3125, identifying existing statutes that were not to be considered modified or replaced by the passage of Title VIII, to include the Fishery Conservation and Management Act of 1976, in which the United States asserts exclusive jurisdiction over a fishery conservation zone that extends 200 miles offshore.[8] *See* 16 U.S.C. § 1811-12. Although other explanations may be possible, this change suggests Congress understood that title VIII applied to outer continental shelf waters.

A second example: At least one of the national wildlife refuges created by the Conservation Act (the Yukon Delta National Wildlife Refuge) has within its borders portions of the outer continental shelf and overlying waters. *See* 48 Fed.Reg. 7890, 8017 (Feb. 24, 1983). Unless these lands and waters are included in Title VIII the protection that title provides for subsistence uses would not apply to the entire Wildlife Refuge though one of the specified purposes of the Refuge is "to provide . . . the opportunity for continued subsistence uses by local residents." *See* Conservation Act, Pub.L. No. 96-487, § 303(7)(B)(iii), 94 Stat. 2371, 2392.

The most compelling reason for resolving the ambiguous language of Title VII in favor of coverage of outer continental shelf lands and waters is that Title VIII was adopted to benefit the Natives. Under a familiar rule of statutory construction doubtful language should be construed to further that purpose. *See Alaska Pacific Fisheries v. United States,* 248 U.S. at 89, 39 S.Ct. at 42; *United States v. Dann,* 706 F.2d 919 at 931, quoting *United*

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[8]*Compare* H.R. 39, § 701(g), 95th Cong., 1st Sess. (Comm.Print Oct. 12, 1977) *with* H.R. 39, as amended, § 713, 95th Cong., 2d Sess. (1978).

*States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 353-54, 62 S.Ct. 248, 255-56, 86 L.Ed. 260 (1941); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257 n. 6 (9th Cir.1983). Congress was specifically advised that this rule of construction would be applied to Title VIII and other subsistence provisions though not to the rest of the Act. In the course of a detailed discussion of the proposed legislation submitted to the House, Congressman Udall said with specific reference to Title VIII:

> While the [Conservation Act] obviously is not Indian legislation in its entirety, the subsistence title and the other subsistence related provisions are. And under well-recognized canons of statutory construction, any ambiguities in the title and other provisions must be resolved in favor of the Alaska Native people.
>
> This result is also consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses.

126 Cong.Rec. 29,279 (1980). *See also* 125 Cong.Rec. 9904 (1979).

As appellees have demonstrated, reasonable arguments can also be made for a narrow construction of section 810. We find them unpersuasive, however, in light of the evidence of a contrary legislative intent and the admonition that ambiguities in Title VIII "must be resolved in favor of the Alaska Native people."

Appellees rely particularly upon reference to the Conservation Act as a "land bill" that would not inhibit development of oil and gas resources on the outer continental shelf. *See e.g.*, 125 Cong.Rec. 11,128 (1979) (statement of Rep. Udall); *id.* at 11,170 (statement of Rep. Emery). These statements were made in response to arguments that the Conservation Act "locked up" Alaskan resources. The statements did not refer to Title VIII but rather to Titles II–VII which add lands to the National Park System and other conservation units. Oil and gas exploration and pro-

duction in fact would be precluded in some of these conservation units and probably in others. Congressmen Udall and Emery were making the point that these conservation units did not include the adjacent outer continental shelf and therefore creation of such units did not preclude oil and gas development on the shelf. *See also* S.Rep. No. 413, 96th Cong., 1st Sess. 417, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 5357.

These statements are not inconsistent with the position that Title VIII includes the outer continental shelf since nothing in Title VIII precludes oil and gas development in the areas to which it applies. The only restrictions imposed by section 810 are procedural ones. Once these are complied with, "the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law." Section 810(d), 16 U.S.C. § 3120(d). In the words of the Senate Report: "[O]nce the requirements of the section are satisfied and incorporated into existing land use planning processes the proposed action may proceed even though its effect may be adverse to subsistence uses." S.Rep. No. 413, 96th Cong., 1st Sess. 234, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 5178.[9]

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[9]The response to other arguments against a broad interpretation of section 810 may be stated briefly.

Rejection by Congress of proposals to extend the coverage of conservation units to areas beyond the territorial sea (*See, e.g.*, S.Rep. No. 1300, 95th Cong., 2d Sess. 149-50 (1978); 124 Cong.Rec. 18025-27 (1978)) is not relevant to the interpretation of Title VIII for the reason mentioned: inclusion in a Title II-VII conservation unit might bar future development, but inclusion in Title VIII would not. Moreover, the "complexity of jurisdictions" that would have resulted from extension of conservation units seaward, *id.*, would not occur under Title VIII since this title contemplates administration of both state and federal lands by the state for the purpose of this section (§ 805(d), 16 U.S.C. § 3115(d)). *See also* 126 Cong.Rec. 29280 (1980).

Other federal statutes applicable in one fashion or another to resource management on the outer continental shelf are neither so comprehensive nor inconsistent with Title VIII as to support an inference

We conclude that the ambiguous language of the Conservation Act should be interpreted to include outer continental shelf lands and waters within the coverage of section 810.

## III.

Appellants ask that the lease sale be voided because the Secretary has not complied with the requirements of section 810. Appellees contend the Secretary has substantially complied with the requirements of the section, albeit acting under other statutes, and if he has not, the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810, citing *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir.1982), *reversed on other grounds*, ___U.S. ___, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984).

These arguments raise factual and legal issues that have not been but should be considered initially by the district court.

[5] Appellants' request for attorneys' fees is denied. Assuming appellants are prevailing parties we cannot say the government's position was not "substantially justified." *See*

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that Title VIII does not apply to these areas. Section 810(b) provides expressly for situations in which both Title VIII and the National Environmental Protection Act, 42 U.S.C. § 4321, *et seq.*, will be applicable. Other statutes of general applicability mentioned by appellees (the Endangered Species Act, 16 U.S.C. § 1531-43; the Coastal Zone Management Act, 16 U.S.C. §§ 1451-54; and the Outer Contental Shelf Lands Act, 43 U.S.C. §§ 1331-56) pursue different goals by different means than Title VIII of the Conservation Act, and may be applied consistently with Title VIII.

Appellees argue that subjecting outer continental shelf lands and waters to certain provisions of the Act other than Title VIII in which the term "public lands" is used would provide "absurd and unintended consequences." We have examined the provisions relied upon by appellees and are satisfied the interpretative difficulties they suggest are resolvable. We need not examine them in detail here, however, since in any event Congress was aware that a standard of interpretation requiring resolution of ambiguities in favor of the Natives would be applicable only to Title VIII and other subsistence provisions of that Act. *See* 126 Cong.Rec. 29,279 (1980); 125 Cong.Rec. 9904 (1979).

*Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984); *Foster v. Tourtellotte*, 704 F.2d 1109, 1112-13 (9th Cir. 1983).

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

## APPENDIX B

**UNITED STATES COURT OF APPEALS**
FOR THE NINTH CIRCUIT

PEOPLE OF THE VILLAGE OF GAMBELL, PEOPLE OF THE VILLAGE OF STEBBINS, and NUNAM KITLUTSISTI,
*Plaintiffs-Appellants,*

vs.

DONALD P. HODEL, Secretary of the Interior, and U.S. DEPARTMENT OF THE INTERIOR,
*Defendants-Appellees,*

ARCO ALASKA, INC., AMOCO PRODUCTION COMPANY, *et al.*,
*Defendants-Intervenors-Appellees.*

**FILED**
Oct 25, 1985
CLERK, U.S. COURT OF APPEALS

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85-3877

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D.C. No. A85-184
Consolidated With
A85-201

**OPINION**

**Appeal from the United States District Court**
**for the District of Alaska**
**J.A. von der Heydt, District Judge, Presiding**

**Argued and submitted September 4, 1985**
**Seattle, Washington**

Before: PREGERSON and ALARCON, Circuit Judges, and DIMMICK, District Judge*

ALARCON, Circuit Judge:

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*Honorable Carolyn R. Dimmick, United States District Judge for the Western District of Washington, sitting by designation.

The People of the Village of Gambell, et al. (hereinafter the Villages),[1] appeal from an order of the district court of Alaska denying consolidated motions for a preliminary injunction. The requested injunction would prohibit exploration for oil and gas on two tracts leased to appellees/intervenors, Arco Alaska, Inc. and Amoco Production Co., et al. (hereinafter the Oil Companies), by the United States Department of the Interior on federally owned lands in the outer continental shelf of Alaska.

We must determine whether the district court abused its discretion in failing to issue a preliminary injunction notwithstanding its determination that the Villages had a "strong likelihood of success on the merits" in light of the presumption of harm flowing from a violation of a statute and the facts in the record showing the possibility of a significant restriction of subsistence use. We conclude that the district court abused its discretion in denying a preliminary injunction because it failed to give proper weight to Congress's expressly stated policy of protecting the subsistence needs and culture of Native Alaskans against the harm which may result from the lease of public lands in the outer continental shelf.

## PERTINENT FACTS

This matter is again before this court following our decision in *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (hereinafter *Gambell I*). In *Gambell I*, the People of the Village of Gambell and the People of the Village of Stebbins brought an action in the district court to enjoin the sale of leases located in federally owned outer continental shelf land in Lease Sale 57. The Secretary of the Interior (hereinafter the Secretary) had of-

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[1]On this appeal from consolidated motions for preliminary injunction, the Villages include The People of the Village of Gambell and The People of the Village of Stebbins, two Alaskan Native Tribes organized under the Indian Reorganization Act. Also included is Nunam Kitlutsisti, an intertribal organization representing subsistence users from 56 villages of the Yukon-Kuskokwian Delta in southwestern Alaska.

fered to sell the leases for oil and gas exploration pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (as amended 1980) (hereinafter the Lands Act). Bids were submitted by the oil companies. Lease Sale 57 consists of approximately 2.4 million acres in the Norton Sound Basin twenty-five miles off the western shore of Alaska.

In *Gambell I* the Villages presented two arguments to the district court in support of their request for an injunction. First, the Villages contended that the sale of leases for oil and gas exploration would interfere with their aboriginal hunting and fishing rights. Second, they asserted that the Secretary failed to evaluate the impact of such laws on the subsistence culture of Native Alaskans as required by section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1980) (hereinafter the Conservation Act) prior to conducting the sales. The district court denied the Villages' motion for a preliminary injunction and granted the Secretary's motion for summary judgment. The district court held that the Villages' aboriginal hunting and fishing rights and their rights protected under section 8.0 of the Conservation Act did not extend to the outer continental shelf outside the territorial boundaries of Alaska.

In his briefs before this court in *Gambell I*, the Secretary argued that if this court " '[s]hould . . . find it appropriate to order the Secretary to carry out the procedures of section 810, there is no need to undo what has already been done. The proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply.' " (Appellants' Reply Brief at 4, *quoting* Brief for Federal Appellees (*Gambell I*), at 49). The oil companies made a similar but more specific recommendation in their brief *Gambell I*. " 'If this court should hold that § 810 of ANILCA applies to the OCS [outer continental shelf], the appropriate remedy would be . . . to enjoin further activities until the Secretary completes the procedures required by the statute, if irreparable harm is shown, *see Weinberger v. Romero-Barcelo*, 456 U.S. 305

(1982).' " (Appellants' Reply Brief at 4, *quoting* Brief of Appellee Arco Alaska, Inc. (*Gambell I*), at 49).

We held in *Gambell I* that the Villages' claims to an aboriginal right to hunt and fish in Norton Sound and in the waters in the outer continental shelf were extinguished by the Alaska Native Claims Settlement Act (hereinafter Claims Settlement Act), 43 U.S.C. §§ 1601-1628 (1971), but that in section 810 of Title VIII of the Conservation Act, Congress provided protection for subsistence uses of the fish and wildlife in the waters and ice over the outer continental shelf by requiring the Secretary to evaluate the effect of a lease sale on subsistence use. *Gambell I*, 746 F.2d at 579-82. In reversing the district court's orders in *Gambell I*, we gave the following direction to the district court:

> Appellants ask that the lease sale be voided because the Secretary has not complied with the requirements of section 810. Appellees contend that the Secretary has substantially complied with the requirements of the section, albeit acting under other statutes, and if he has not, the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810, citing *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir. 1982), *reversed on other grounds*, ___U.S. ___, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984).
>
> These arguments raise factual and legal issues that have not been but should be considered initially by the district court.

*Gambell I*, 746 F.2d at 582-83.

*Gambell I* was argued before this court on October 7, 1983. On April 17, 1984, while the matter concerning Lease Sale 57 was still under submission to this court, the Secretary held a sale of leases on Lease Sale 83 in the outer continental shelf lands in the Navarin Basin off the shore of Alaska. This court filed its opinion in *Gambell I* on November 2, 1984. Due primarily to delays requested by the Secretary, the decision in *Gambell I* did not become final until mandate issued on March 2, 1985.

On April 3, 1985, the People of the Villages of Gambell and Stebbins brought a motion for preliminary injunction to halt exploratory activities on Lease Sale 57.

On April 25, 1985, the People of the Village of Gambell and the intertribal organization of Nunam Kitlutsisti filed a separate action to enjoin future exploratory activities on Lease Sale 83 and to rescind the authority previously granted to the Oil Companies in that portion of the outer continental shelf. Lease Sale 83 consists of approximately 37 million acres and is located in the water of the Bering Sea in the outer continental shelf due west of St. Mathews Island, approximately 250 miles from the mainland of Alaska.

This separate complaint was based on precisely the same grounds alleged in the prior action (*Gambell I*) concerning Lease Sale 57: i.e., that the Secretary failed to comply with section 810 of the Conservation Act prior to authorizing exploratory activities in the waters over the outer continental shelf. The district court consolidated these matters for the hearing on the Villages' motion for a preliminary injunction.

The district court applied the "traditional" test for determining whether injunctive relief is warranted, and denied the request for a preliminary injunction. The district court first explained that the Secretary did not comply with the requirements of section 810 of the Conservation Act because he failed to evaluate the subsistence impacts of the leases with the mandate of that law clearly in mind. After finding that "delay in the exploration of the OCS [outer continental shelf] may cause irreparable harm to this nation's quest for new oil resources and energy independence," the court nonetheless concluded:

(1) Movants have established a strong likelihood of success on the merits.

(2) The balance of irreparable harm does *not* favor the movants.

> (3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS [outer continental shelf] oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent.

On May 30, 1985, the district court issued a minute order *sua sponte* stating that

> The court has been informed that its denial of plaintiffs' motion for preliminary injunction will be appealed to the Ninth Circuit. In order to expedite the appeal, and for the reasons stated in this court's earlier order, the court indicates that it will not entertain a motion for stay pending appeal.

On June 6, 1985, a motions panel of this court issued an order denying the Villages' emergency motion for an injunction pending appeal. The Secretary and the Oil Companies were ordered to file, within seven days, a hold harmless agreement "that will protect appellants from any consequences resulting from significant restrictions upon subsistence uses by appellants of their lands." The motions panel retained jurisdiction of this matter for "the purpose of reimposing a temporary stay should the panel disapprove the form and substance of the hold harmless agreement." The hold harmless agreement was approved by the motions panel on June 21, 1985.

## DISCUSSION

Our review of a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The decision to grant or deny is within the discretion of the trial court and will only be reversed if that discretion has been abused or if the decision is based on erroneous legal standards or clearly erroneous findings of fact." *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

**A. Applicability of the Traditional Test**

This court has recognized two sets of standards for evaluating a claim for injunctive relief. We refer to one as the "traditional" test and the other as the "alternative" test. *American Motorcyclist Ass'n v. Watt,* 1714 F.2d 962, 965 (9th Cir. 1983). In *American Motorcyclist Ass'n* we described the traditional test as follows: "The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?" *Id.* at 965.

"The 'alternative' test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor." *Id. (citing Benda v. Grand Lodge of IAM,* 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975)).

We have concluded, however, that the traditional and the alternative tests are "not really two entirely separate tests, but that they are merely extremes of a single continuum." *Benda v. Grand Lodge of IAM,* 584 F.2d at 315. *Accord, Regents of University of California v. ABC,* 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We have also noted that "[t]he difference between the two formulations is insignificant. Therefore, we accept either as satisfactory." *Benda,* 584 F.2d at 315. Because the district court employed only the traditional test, we will review the findings under that formulation. *See Regents of University of California v. ABC,* 747 F.2d at 515-16 n. 4 (where the district court made a finding that the public interest favored the issuance of the preliminary injunction, this court reviewed the district court's findings under the traditional standard).

**B. Likelihood of Success on the Merits**

The Villages argue that the district court properly determined that they had established "a strong likelihood of success on the merits" on their claim that the Secretary could not have substantially complied with the provisions of the Conservation Act because he did not have its mandates "clearly in mind." The district court correctly concluded that an administrative decision compelled by a land preservation statute must be made with the requirements imposed by Congress clearly in mind. *See Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445 (9th Cir.) ("a court reviewing the Secretary's 4(f) decision must satisfy itself that the Secretary evaluated the highway project with the mandates of section 4(f) clearly in mind"), *cert. denied*, 429 U.S. 999 (1976). *Accord, Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982).

Prior to Lease Sale 57 and Lease Sale 83, the Secretary did not have the requirements of Congress in mind because it was his contention that section 810 of the Conservation Act did not apply to land beneath the water of the outer continental shelf off the coast of Alaska. Section 810(a) of the Conservation Act provides in pertinent part as follows:

> In determining whether to . . . lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee *shall evaluate* the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

16 U.S.C. § 3120(a) (1982) (emphasis added). Therefore, in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses and needs of the Native Alaskans who are part of the Villages.

We agree with the district court's determination that the Secretary failed to comply with the mandatory requirements of section 810(a). In *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984), we said that section 810(a) "requires the agency to evaluate the effects upon subsistence needs of leasing the particular tracts tentatively selected . . . ." *Id.* at 1151. After *Gambell I*, it is clear that section 810(a) does apply to public lands in the outer continental shelf.

The Secretary contends, however, that his compliance with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321-4347 (1976) (hereinafter the Environmental Act or NEPA) and the Lands Act is sufficient to satisfy the evaluation provisions of section 810(a) of the Conservation Act. The Secretary asserts that "[T]here is no additional requirement that the agency decision maker have one statute in mind rather than another when he takes the action." This argument completely ignores this court's observation in *Gambell I* that section 810 was enacted because "the Secretary and the state [of Alaska] failed to heed Congress's admonition [that they take any action necessary to protect subsistence needs of Alaskan Natives]." *Gambell I*, 746 F.2d at 580.

The uncontradicted facts in this matter establish that the Secretary deliberately ignored the specific requirements of section 810(a) prior to the lease sales because of his erroneous belief that its provisions did not apply to the outer continental shelf. Nevertheless, we are now told that the Secretary complied with the Conservation Act prior to the lease sales because in meeting the requirements of the Environmental Act and the Lands Act he inadvertently considered the needs of the subsistence users. If we were to adopt this surprising contention, we would render section 810(a) superfluous and assume that its enactment was an idle act. "We should not and do not suppose that Congress intended to enact unnecessary statutes." *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977).

It is quite true that section 810(a) makes reference to the Environmental Act. Section 810(a)(2)(b) provides as follows:

> If the Secretary is required to prepare an environmental impact statement pursuant to [Section 102(2)(c) of the National Environmental Policy Act], *he shall* provide the notice and hearing and *include the findings required by subsection (a) of this section* as part of such environmental impact statement.

16 U.S.C. § 3120(b) (1982) (emphasis added). It is clear to us from this language that Congress intended that the section 810(a) requirement that the Secretary evaluate and make findings concerning subsistence needs *supplements* any overlapping duties which he may have under the Environmental Act.

In support of his contention that compliance with the Lands Act and the Environmental Act constitutes substantial compliance with the requirements of section 810(a) of the Conservation Act, the Secretary refers us to *Life of Land v. Brinegar*, 485 F.2d 460, 474 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974), *Citizens Airport Comm. v. Volpe*, 351 F. Supp. 52 (E.D. Va. 1972), *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 356 (8th Cir. 1972), *Cape Henry Bird Club v. Laird*, 484 F.2d 453, 454 (4th Cir. 1973), and *Missouri ex rel. Ashcroft v. Dep't of Army*, 526 F. Supp. 660, 667 (W.D. Mo.1980), *aff'd* 672 F.2d 1297 (8th Cir.1982). These authorities do not support the Secretary's contention that compliance with either the Lands Act or the Environmental Act constitutes de facto compliance with the Conservation Act.

In *Brinegar*, w held that an environmental impact statement prepared pursuant to the Environmental Act may be considered as the finding of no adverse environmental effect required under section 16(c)(4) of the Airport and Airways Development Act of 1970 because each statute contains virtually the same requirements. 485 F.2d at 474. In *Citizens Airport Comm.*, the district court noted, in passing, that "[t]he fact that the impact statement was

prepared for the purpose of satisfying NEPA does not prevent its being used to satisfy the requirements of § 1716 [of the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 *et seq.*] if, in fact, it contains all of the findings demanded by that provision." 351 F. Supp. at 59. In *Environmental Defense Fund, Inc. v. Froehlke,* the court held that if an agency complies with the Environmental Act, it will " 'automatically take into consideration all of the factors required by the Fish and Wildlife Act and it is not reasonable to require them to do both separately.' " 473 F.2d at 356 (*quoting Environmental Defense Fund, Inc. v. Corps of Engineers,* 325 F. Supp. 749, 754 (E.D. Ark. 1971), *vacated on other grounds,* 342 F. Supp. 1211 (E.D. Ark. 1972)). We have no quarrel with the proposition that if the environmental concerns expressed in one statute are "automatically" taken into consideration on complying with the requirements of another Act of Congress, it would not be reasonable for the courts to insist on separate reports. As noted above, however, it was the failure of the Secretary to protect subsistence needs under existing administrative authority which compelled Congress to enact section 810(a). *Gambell I,* 746 F.2d at 580.

We previously have held that "compliance with one environmental statute does not assure compliance with another." *Adler v. Lewis,* 675 F.2d at 1096. Where each statute mandate separate and distinct procedures, compliance with the requirements of one does not compel the conclusion that the provisions of the other statute were considered. *Id.* Neither the Environmental Act nor the Lands Act sets forth procedures to ensure the protection of subsistence needs and uses. In contrast, the Conservation Act was created "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." Conservation Act § 101(c), 16 U.S.C. § 3101(c) (1982).

As we noted in *Gambell I,* "Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife 'is essential to [their]

existence'." *Id.* at 580 (*quoting* Conservation Act § 801(1), 16 U.S.C. § 3111(1)(1980)). The separate and distinct procedures set forth in section 810(a) of the Conservation Act were enacted to fulfill that purpose. The Environmental Act and the Lands Act do not, by their terms, seek to advance the same Congressional goals. For purposes of resolving the issues presented in reviewing the denial of a preliminary injunction, we conclude that the district court did not err in its determination that there was a strong likelihood that the Villages would succeed at trial on the merits in their legal contention that substantial compliance with the Environmental Act and the Lands Act would not constitute automatic or substantial compliance with the Conservation Act.

The district court also concluded that the Villages had a strong likelihood of success on the merits of their contention that the Secretary violated the notice, hearing, and findings requirements of section 810(a)(1)-(3) in connection with Lease Sale 57. We agree.

Under section 810(a)(1)-(3), the Secretary is prohibited from leasing public lands without complying with the notice and hearing procedures if the agency concludes that the proposed action "may significantly restrict subsistence uses." *Kunaknana v. Clark*, 742 F.2d at 1151. After receiving this court's opinion in *Gambell I*, the Secretary conducted a post-sale study concerning Lease Sale 57. That report contains the finding that while the lease and exploration stages will not significantly restrict subsistence, development and production "may significantly restrict subsistence uses in certain areas." We made it clear in *Kunaknana* that under the express language of section 810(a)(3), the Secretary was required to comply with the notice and hearing requirements of the statute to determine *inter alia* whether " 'such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands.' " 742 F.2d at 1150-51 (*quoting* section 810(1)(3)).

The Secretary argues that he was not required to comply with the notice and hearing requirements of section

810(a)(1)-(3) prior to the sale of the leases with respect to the significant restriction of subsistence use that may develop at the production stage. The Secretary relies on *Secretary of Interior v. California,* 464 U.S. 312 (1984). His reliance is misplaced. First, in *Secretary of the Interior v. California,* the Supreme Court did not concern itself with a construction of section 810(a)(1)-(3) of the Conservation Act. The Court was faced with the question whether section 307(c)(1) of the Coastal Zone Management Act applies prior to a lease sale. *Id.* at 315. As the district court in the instant matter correctly noted, the decision of the Supreme Court that the Coastal Zone Management Act did not apply to lease sales was premised on the fact that Congress had recognized "four distinct statutory stages to developing an offshore oil well." *Id.* at 337. The four steps set forth in the Lands Act are as follows:

1. The planning of a five-year nationwide leasing program. 43 U.S.C. § 1344.

2. The lease sale. 43 U.S.C. § 1337 (a).

3. Exploration. 43 U.S.C. § 1340.

4. Development and production. 43 U.S.C. § 1351.

In the Conservation Act, however, Congress has expressly provided for a specific and detailed procedure to be followed in evaluating the impact on subsistence use of the lease of public land for exploratory activities. As this court pointed out in *Kunaknana v. Clark,* section 810(a) of the Conservation Act requires a hearing *before* a lease shall be effected if such lease "or other use, occupancy or disposition of such [public] lands" may significantly restrict subsistence use. 742 F.2d at 1150-51. "It is a basic rule of statutory construction that a specific statute controls over a general statute. *ECSC-Laundry v. United States,* 450 U.S. 1, 6 (1981). If we were to hold that the more general statute controls over the specific one, we would effectively eliminate the specific statute." *Edward D. Rollert Residuary Trust v. C.I.R.,* 752 F.2d 1128, 1133 (6th Cir. 1985).

The district court did not err in determining, for purposes of ruling on the Villages' motion for a preliminary injunction, that the Villages had demonstrated a strong likelihood of success on the merits of their contention that the Secretary failed to comply with the notice and hearing requirements of the Conservation Act concerning Lease Sale 57. We are satisfied that there is a strong likelihood of success on the merits of the Villages' argument that the specific procedural requirements of section 810(a)(1)-(3)–which are triggered by the threat of a significant restriction of subsistence use–were intended by Congress to serve as an exception to the general provisions of the Lands Act.

**C. Balance of Irreparable Harm**

Notwithstanding its determination that the Secretary violated the procedural requirements of section 810(a) of the Conservation Act, the district court denied the Villages' request for a preliminary injunction. The district court's ruling is not consistent with the law of this circuit. An injunction is the appropriate remedy for a substantive procedural violation of an environmental statute. *See Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985). "Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984). In *Save Our Ecosystems v. Clark,* we also noted that "[o]nly in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation." *Id.* at 1250. " 'It does appear that any lower court, much less the Supreme Court, has ever found in a proceeding on the merits that federal actions violating NEPA could continue in opposition to the statutory mandates.' " *Id.* at 1250 n.15 (*quoting* Plater, *Statutory Violations and Equitable Discretion,* 70 Cal. L. Rev. 524, 575 (1982)).

Mindful of the law in this circuit, the district court concluded that there were unusual circumstances in the instant matter which made the issuance of an injunction "inappropriate." However, the court did not articulate the unusual circumstances upon which it relied to excuse its

duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail in their contention that section 810(a) of the Conservation Act had been violated. Instead, the court found as follows:

(1) That delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence. Expedited exploration as a policy is stated in OCSLA. *See* 43 U.S.C. § 1332(3);

(2) That exploration will not significantly restrict subsistence resources; and

(3) That the Secretary continues to possess power to control and shape the offshore leasing process. Therefore, if the ANILCA subsistence studies require alteration of the leasing conditions or configuration the Secretary will be able to remedy any harm caused by the violation.

The district court relied upon *Forelaws on Board v. Johnson,* 743 F.2d 677 (9th Cir. 1984) and *Alaska v. Andrus,* 580 F.2d 465 (D.C. Cir.), *vacated in part on other grounds as moot,* 439 U.S. 922 (1978). These cases do not support the district court's conclusion that these factors justify the denial of an injunction under the circumstances of this case. Notwithstanding a violation of the Environmental Act, this court refused to issue an injunction in a matter over which it had original jurisdiction because such relief would interfere with the operation of 20-year contracts, most of which were then in the third year of their term. *Forelaws on Board v. Johnson,* 743 F.2d at 685. Here, however, the injunction was sought *prior* to the sale of any leases in the outer continental shelf; therefore, the issuance of an injunction, at the time it was requested, would not have interfered with a long-term contractual relationship. The first well on Lease Sale 83 was not spudded until June 2, 1985. The Villages' consolidated requests for injunctive relief were denied on May 23, 1985. Had the district court issued a preliminary injunction when it

was first requested, no leases would have been made until the requirements of the Conservation Act were met.

*Alaska v. Andrus* is factually distinguishable and contrary to the law of this circuit. First, the D.C. Circuit Court apparently does not follow the Ninth Circuit rule that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances. *See Thomas v. Peterson,* 753 F.2d at 764 ("absent 'unusual circumstances,' an injunction is the appropriate remedy for a violation of NEPA's procedural requirements"); *Alpine Lakes Protection Society v. Schlapfer,* 518 F.2d 1089, 1090 (9th Cir. 1975) (the policies underlying an environmental protection statute (NEPA) "weight the scale in favor of those seeking the suspension of all action until the Act's requirements are met"). The Ninth Circuit rule was not discussed in *Alaska v. Andrus.* Instead, the D.C. Circuit followed a rule which restricts the availability of an injunction against an ongoing project to cases where it is necessary primarily "to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by NEPA." *Alaska v. Andrus,* 580 F.2d at 485.

This court has found "unusual circumstances" in cases which have upheld the denial of a preliminary injunction to enjoin a project from proceeding in violation of an environmental protection statute where irreparable harm *to the environment* would result if such relief were granted. *Thomas v. Peterson,* 753 F.2d at 764 n.8. Similarly, in *Alpine Lakes Protection Society v. Schlapfer,* we denied a motion for an injunction pending appeal notwithstanding the presence of substantial questions concerning the Forest Service's compliance with the Environmental Act, because the issuance of an injunction against the use of a logging road would prevent the removal of diseased trees and permit the spread of insect infection throughout the adjacent national forest lands. 518 F.2d at 1090.

In *American Motorcyclist Ass'n v. Watt,* the plaintiffs filed an action to enjoin the Secretary's plan to conserve

and protect the fragile resources in the California desert from recreational use. 714 F.2d at 963-64. The plaintiffs alleged that the plan would prevent traditional recreational vehicle use of the California desert and diminish the number of motorcycle events. *Id.* The district court expressly found that "there was a danger of harm to the fragile desert resources of the [California Desert Conservation Area] if the Plan's restrictions were lifted and plaintiffs were allowed to pursue increased motor vehicle use." *Id.* at 966. We upheld the denial of a preliminary injunction in *American Motorcyclist Ass'n v. Watt* in the face of a strong showing on the merits that the Secretary of the Interior had violated procedural provisions of the Environmental Act, because of the presence of unusual circumstances, i.e. the damage to fragile desert resources. *Id.* at 966-67. We discussed the impact of the exception to the rule set forth in *Alpine Lakes Protection Society v. Schlapfer,* requiring the issuance of a preliminary injunction upon a showing of a violation of the procedural prerequisites of an environmental statute, and explained: "*Alpine* thus authorizes the court not only to weigh the relative hardship and harms to the parties, but to examine how the greater public interest may be affected in the unusual case where enjoining government action allegedly in violation of NEPA might actually jeopardize natural resources." *American Motorcyclist Ass'n v. Watt,* 714 F. 2d at 966.

In the matter before us the district court did not and could not make a finding that the issuance of a preliminary injunction preventing lease sales would endanger the subsistence uses and resources of the waters off the coast of Alaska. In fact, the Secretary's lease sale plan poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact section 810(a) of the Conservation Act. In *Gambell I,* we expressed this view as follows:

> When Congress adopted the Claims Settlement Act it was aware that extinguishing Native rights might threaten subsistence hunting and fishing by Alaska Natives. The Senate version of the Claims Act in-

> cluded provisions directing the Secretary to protect subsistence uses on public lands. The Conference Committee eliminated this provision, but the Committee made it clear that it did so only because it concluded subsistence resources should be protected by the Secretary of Interior through the exercise of existing administrative authority. The Committee wrote: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *See* H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. Title VIII of the Conservation Act was enacted because the Secretary and the state failed to heed Congress' admonition.

*Gambell I*, 746 F.2d at 580.

The record does not disclose any unusual circumstances which threaten the environment such as those which we recognized in *Alpine Lakes Protection Society v. Schlapfer* and *American Motorcyclists Ass'n v. Watt*, which would justify denial of a preliminary injunction where there is a strong likelihood that the Villages will succeed in demonstrating that the Secretary has violated a statute directed at preserving or conserving the environment. On the contrary, the Secretary's leasing plan poses a threat to the preservation of the subsistence culture of Native Alaskans. Nor would the issuance of a preliminary injunction have interrupted the performance of long-term contracts as was the case in *Forelaws on Board v. Johnson*. We conclude, therefore, that the district court erred in finding that this is the type of rare or unusual case that justifies the denial of a preliminary injunction in the face of its conclusion that there is a strong likelihood of success on the merits.

**D. Public Interest**

As set forth above, the district court found that the public interest favored oil exploration in the outer continental shelf. This finding is not supported by a recitation

of the facts relied upon by the district court that would demonstrate how the district court divined the public interest.

The Secretary correctly observes that the purpose of the 1978 amendments to the Lands Act was to expedite the

> exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade . . . .

43 U.S.C. § 1802 (as amended 1978).

The Secretary continues to ignore, however, the fact that section 810(a) of the Conservation Act was adopted by Congress "to benefit the Natives" and to be "consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses." *Gambell I*, 746 F.2d at 581 (*quoting* 126 Cong. Record 29,279 (1980)). As our highest court noted in a different context, "[t]he choice between these two policy arguments is not ours to make; it has already been made by Congress." *Secretary of Interior v. California*, 464 U.S. at 342.

Congress enacted section 810(a) in 1980 to protect the subsistence culture of Native Alaskans from exploration of the outer continental shelf that would impair their subsistence needs and uses. The Conservation Act defines subsistence uses as follows:

> [T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (1982).

The maintenance of this subsistence economy is requisite to the literal survival of these isolated Alaskan tribal villages. On St. Lawrence Island alone, 80 percent of all food consumed annually comes from the sea and land. A substantial portion of their cash income comes from carved walrus ivory. Moreover, even if the community's physical survival is not placed in immediate jeopardy by disruptions from oil and gas exploration, the very social structure of the village is jeopardized. "A reduced availability of naturally recurring resources . . . alter[s] the depth, breadth and strength of the clans, *the organizational core of society.*" Ronald L. Little and Lynn A. Robbins, Technical Report No. 89, *Effects of Renewable Resource Harvest Descriptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island*, at 304 (emphasis added). Subsistence is nothing less than "a symbolic and organizational base for their spiritual life." *Id.* at 360.

The district court's finding that the public interest favored oil exploration over the preservation of the subsistence culture of the Alaskan Natives violates the clearly expressed Congressional intent that lease sales *shall not* be conducted until the Secretary has evaluated the effect of the Oil Companies' activities on the subsistence uses and needs of Native Alaskans. The by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans. *Id.* at 330-374. This error of law compels reversal.[2]

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[2]Appellees rely on *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) for the proposition that "[a] showing of threatened irreparable harm has always been the prime prerequisite for obtaining injunctive relief." Brief for the Federal Appellees, p. 40. *Romero-Barcelo* is distinguishable from the matter before us in several important respects.

First, *Romero-Barcelo* did not involve the tension between the requirements of the Conservation Act and the Lands Act. Instead, the narrow question before the Court in *Romero-Barcelo* was stated as

## E. Retroactivity

The Secretary and the Oil Companies argue that our decision in *Gambell I* may not be applied retroactively to

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follows:

> The issue in this case is whether the Federal Water Pollution Control Act (FWPCA or Act), 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.* (1976 ed. and Supp. IV), requires a district court to enjoin immediately all discharges of pollutants that do not comply with the Act's permit requirements or whether the district court retains discretion to order other relief to achieve compliance.

456 U.S. at 306-07. The Supreme Court observed that injunctive relief was not the only means of insuring compliance under the statute. The Court noted that "[t]he FWPCA itself, for example, provides for fines and criminal penalties. 33 U.S.C. §§ 1319(c) and (d)." *Id.* at 314. The Court construed the statute as permitting the district court "to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation." *Id.* at 320. Unlike the FWPCA, the injunctive relief we grant is the only means of insuring compliance under section 810.

In *Romero-Barcelo*, the Supreme Court contrasted the requirements imposed by Congress in the FWPCA with its construction of the Endangered Species Act (87 Stat. 884, 16 U.S.C. § 1531 *et seq.*) in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In *TVA v. Hill*, the Supreme Court held that an imminent violation of the Endangered Species Act required injunctive relief. *Id.* at 172-73. In *Romero-Barcelo*, the Court summarized its holding in *TVA v. Hill* as follows:

> Refusal to enjoin the action would have ignored the 'explicit provisions of the Endangered Species Act.' 437 U.S., at 173. Congress, it appeared to us, had chosen the snail darter over the dam. The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate *the objectives of the Act.*

*Romero-Barcelo*, 456 U.S. at 314 (emphasis added).

It appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration. Thus, only the issuance of a preliminary injunction to compel compliance with the requirements of section 810 can uphold Congressional intent. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. at 194.

Secondly, *Romero-Barcelo* is not dispositive because in that matter

Lease Sale 83. This contention was not raised in the district court. Ordinarily, we "will not . . . review an issue not raised below unless necessary to prevent manifest injustice." *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). However, we have the discretion to review issues raised for the first time on appeal "if it would not cause the parties to develop new facts." *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984). We will address the retroactivity issue because it does not involve a fact determination and because it is central to the case and important to the public. *Commodity Futures Trading Comm'n v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 581 (9th Cir. 1982).

The Secretary and the Oil Companies rely primarily upon *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to support their retroactivity argument. In *Chevron Oil Co.*, the Supreme Court set forth the following test for determining whether to apply a court decision retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation omitted], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, [citation omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its opera-

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the district court denied injunctive relief after a trial on the merits of the complaint for injunctive relief. This matter is before us on an interlocutory appeal. We do not know what evidence will be developed at trial. In the absence of a fully developed trial record, we cannot now decide whether a permanent injunction should issue in this matter. The fact, as noted by our dissenting colleague, that this court may visit this case again should not cause us to issue an advisory opinion or attempt to usurp the function of the district court. Congress has determined that interlocutory review is available to persons seeking review of an order granting or refusing an injunction. 28 U.S.C. § 1292(a)(1). The plaintiffs in this matter have properly exercised their rights.

> tion.' [citation omitted]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' [citation omitted].

404 U.S. at 106-07.

Applying the *Chevron* factors, we are persuaded that our decision in *Gambell I* should be applied retroactively. Although *Gambell I* established a new principle of law in construing section 810(a) of the Conservation Act as applicable to the outer continental shelf, our review of the prior history of section 810(a) of the Conservation Act and its stated purpose satisfies us that retroactive application of *Gambell I* would further the operation of a statute enacted by Congress expressly to protect subsistence uses and resources from any harmful effects resulting from oil exploration. No substantial inequitable results would occur from retroactive application. *See Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 563 (9th Cir. 1984) (a decision should not be applied retroactively if it would produce substantial inequitable results). The facts demonstrate unequivocally that the Secretary conducted Lease Sale 83 with knowledge that his right to do so without complying with the Conservation Act was in doubt in light of the fact that an appeal was then pending on Lease Sale 57. Any financial losses which may have been incurred by the Oil Companies were also incurred with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending before the court. Under the *Chevron* test, retroactive application of our prior decision in *Gambell I* is proper.

**F. Laches**

The Secretary and the Oil Companies assert that the Villages' motion for a preliminary injunction of exploratory activities on Lease Sale 83 is barred by laches. This con-

tention is predicated on the fact that this action to enjoin Lease Sale 83 was filed on April 25, 1985, more than one year after the notice of sale was published on April 17, 1984.

We agree with the Villages that the district court properly rejected the laches claim. In order to prevail on this equitable defense, the Secretary and the Oil Companies must have demonstrated that the Villages unreasonably delayed in asserting a known legal right and that this delay caused the Secretary and the Oil Companies prejudice. *See Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980). We review the district court's ruling concerning the defense of laches for an abuse of discretion. *Id.*

We conclude that the Villages' delay was reasonable for the following reasons:

(1) On March 4, 1983, more than one year before the sale was held, the Village of Gambell gave the Secretary notice that it believed that section 810 of the Conservation Act applied to leases of public lands in the outer continental shelf by filing a claim for injunctive relief concerning Lease Sale 57.

(2) On April 17, 1984, Lease Sale 83 was held.

(3) On November 24, 1984, we issued our decision in *Gambell I* wherein we held that section 810 of the Conservation Act applied to leases in the outer continental shelf. *Gambell I*, 746 F.2d at 582. On May 10, 1983, prior to Lease Sale 83, a motions panel of this court had held that there was insufficient reason to enjoin lease sales in the outer continental shelf pending appeal of the denial of the preliminary injunction requested to prevent Lease Sale 57.

(4) Thus, a challenge to Lease Sale 83 would have been useless.

Under these circumstances, the district court did not abuse its discretion in holding that the delay was reasonable and did not cause the Secretary or the Oil Companies any prejudice which was not the result of a calculated risk.

## CONCLUSION

The Secretary failed to evaluate the effect on subsistence uses and needs of the Alaskan Natives prior to Lease Sale 57 and Lease Sale 83 because of his belief that section 810(a) of the Conservation Act did not apply to the outer continental shelf. For purposes of reviewing the denial of a preliminary injunction, we conclude that the district court correctly determined that there was a strong likelihood that the Villages would succeed in their claim that the Secretary failed to comply with section 810 of the Conservation Act.

The district court erred as a matter of law in concluding that these facts presented rare or unusual circumstances justifying a failure to follow the rule that a preliminary injunction should issue where a federal agency has violated the procedural requirements of an environmental protection or conservation statute. Under these facts, the issuance of a preliminary injunction would not have resulted in a belated interruption of long term contracts or interfered with any plan to *preserve* subsistence uses or to *protect* the environment. Instead, the Secretary's plan involves exploitation of finite environmental resources and a potential threat to the subsistence culture of Alaskan Natives.

The Conservation Act was amended in 1980 for the express purpose of compelling the Secretary to consider subsistence uses and needs in exploring and developing our oil resources in the public lands beneath the outer continental shelf. The public interest as expressed by Congress in the 1980 amendments to the Conservation Act requires that the uses and needs of the Alaskan Natives, and our national concern over survival of their culture,

must prevail over our possible energy needs. Thus, the denial of a preliminary injunction was error because the court misapplied the law of the circuit concerning the "unusual circumstances" exception and failed to honor the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.

The district court is directed to enter a preliminary injunction enjoinging all activities in connection with Lease Sale 57 and Lease Sale 83 pending its determination of the consolidated claims for injunctive relief and pending resolution of the issues which it must address pursuant to the instructions of this court in *Gambell I*.

In accordance with the stipulation of the parties, the hold harmless agreement will terminate as of the date that the Oil Companies inform this court that their 1985 drilling operation in Lease Sale 57 and Lease Sale 83 have terminated and that all drilling rigs and support craft have vacated the area.

Reversed and Remanded.

**Filed**
**Oct 25, 1985**
**CLERK, U.S. COURT OF APPEALS**

PEOPLE OF THE VILLAGE OF GAMBELL v. HODEL

**No. 85-3877**

DIMMICK, J. (dissenting)—This is the second time this court has punted to the trial court. In the first appeal, *Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) ("*Gambell I*") it was clear that the Secretary of Interior had violated an environmental statute by not complying with section 810 of the Alaska National Interest Lands Conservation Act (ANILCA). The court, however, did not direct the trial court to enter an injunction. Instead, the only guidance it gave to the trial court was for it to determine "the proper remedy." *Id.* at 573. The trial court determined that, at this time, a proper remedy does not include a preliminary injunction.

The majority now tells the trial court, on the same facts available in *Gambell I*, that the trial court erred and that it must enter a preliminary injunction. Nevertheless, the majority does not tell the trial court whether a permanent injunction must be issued, or whether post-sale compliance with section 810 is acceptable. Thus, this case will probably become a trilogy.

Our review of the trial court's decision denying the preliminary injunction is limited. *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521 (9th Cir. 1984). The trial court's decision to grant or deny an injunction is discretionary and will be reversed only if based on erroneous legal standards or clearly erroneous findings of fact. *Sports Form, Inc. v. United Press International*, 686 F.2d 750 (9th Cir. 1982). I find that the trial court used the correct legal standard and that its findings of fact are

supported by the record. Thus, I would affirm its discretionary decision to deny the preliminary injunction. I would also not apply *Gambell I* retroactively to Lease No. 83.

## I.

The trial court found that while appellants were likely to succeed on the merits the balancing of the irreparable harms favored appellees, not appellants. It accordingly refused to issue a preliminary injunction.

The majority, in reversing the trial court's decision, advances a new rule: absent unusual circumstances, an injunction must be issued when an environmental statute has been violated.[1] The Supreme Court, however, has rejected such a rigid approach to the issuance of an injunction. In *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), the Navy had violated the provisions of an environmental statute—the federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 (1982). The district court refused to enter an injunction pending compliance. The Court of Appeals for the First Circuit reversed holding that the district court was required to enter an injunction. *Romero-Barcelo v. Brown,* 643 F.2d 835 (1st Cir. 1981). The First Circuit stated that "regardless of the district court's finding that the Navy's dropping of ordinance caused no significant harm to the environment, it erred in failing to consider the judiciary's 'responsibility to protect the integrity of the . . . process mandated by Congress . . . .'" *Id.* at 861 (citations omitted). The Supreme Court reversed. The Court noted that the equitable remedy of an injunction requires flexibility and the exercise of discretion and that it should only be entered to protect a party from irreparable harm. *Weinberger v. Romero-Barcelo, supra* at 312.

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[1]The majority promulgates this rule as if it were well settled. That is not the case. If it were this court in *Gambell I* would have directed the trial court to enter an injunction since it was evident at that time that an environmental statute had been violated and that no unusual circumstances existed.

The majority does not include this case in its analysis of when an injunction should be issued for the violation of an environmental statute. (See Majority Opinion, section C.) In my opinion it is binding precedent.

While there is a presumption that irreparable harm flows from a violation of an environmental statute, *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), such a presumption is not irrebuttable. A party opposing the issuance of an injunction may present evidence showing that no irreparable harm will occur. Appellees have done exactly that. Appellees presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources. In addition, appellees presented evidence which showed that they would have suffered irreparable harm if a preliminary injunction had been issued. At the time the district court was deciding whether to enter a preliminary injunction, Exxon, Amoco, and ARCO had committed almost $70 million in support of their plans to explore Lease Tracts Nos. 57 and 83 during the summer of 1985. If the trial court had enjoined their exploration activities their money would have been lost. The permanent loss of $70 million constitutes substantial irreparable harm. In contrast, the appellants advanced two arguments to support the presumption of irreparable harm: (1) the danger of bureaucratic commitment and (2) speculative harm to the environment. The record amply supports the trial court's conclusion that appellants would not suffer any significant harm.[2] Thus, appellees successfully rebutted the presumption which favored appellants. Accordingly, the trial court did not err in refusing to grant the injunction.

## II.

The Lease No. 83 sales were conducted six and one-half months before this court filed its decision in *Gambell I*. Appellants, who were aware of Lease Sale No. 83, did

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[2]The majority fails to specify what irreparable harms appellants will suffer and I fail to find any.

not file a suit advancing the ANILCA claim as they had done in Lease No. 57. Moreover, they did not challenge Exxon's, ARCO's or Amoco's plans of exploration which were approved by the Department of Interior. Relying on these approvals, Exxon, ARCO, and Amoco committed over $60 million preparing for the 1985 drilling season. It was not until April 22, 1985, a full year after the lease sales were conducted and five months after *Gambell I* was decided that appellants filed a complaint arguing that Lease Sale No. 83 should also be voided.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court set forth three factors to be used for determining whether to apply a court decision retroactively.[3] The majority concedes that *Gambell I* established a new principle of law. This weighs in favor of not applying *Gambell I* to Lease No. 83. I disagree, however, with the majority's conclusions as to the other two factors.

The majority concludes, without providing an adequate explanation, that the retroactive application of *Gambell I* would further the operation of the statute. Contrary to the majority's assertion, the trial court specifically found that there is no reason to believe that any aspect of Sale No. 83 will restrict subsistence uses. Moreover, retroactive application of *Gambell I* is unnecessary to achieve the statute's goals. Instead, those goals can be fully realized by a declaration that ANILCA evaluations must be published for future Alaska OCS sales and that the evaluations must be prepared for the exploration and development/production plans of all prior sales.

Applying the third factor, the majority finds that no substantial inequitable results would follow from retroactive application. The majority views any financial loss which the appellees may have suffered as a calculated risk on their part because an appeal was pending in this court on

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[3]The three factors are: (1) does the decision establish a new principle of law; (2) will retroactive application of the decision further or retard its application; and (3) is it equitable to apply the decision retroactively. *Chevron Oil Co. v. Huson*, 409 U.S. 97, 106–107 (1971).

Lease No. 57. I do not agree. As noted earlier, appellants did not object to Lease Sale No. 83. Nor did they file any objections to the plans of exploration which were approved. When the oil companies made their expenditures they were relying on a valid court judgment and relying on approved plans of exploration. To hold that those oil companies were taking a "risk" is an unfair characterization of the circumstances. To now apply a new legal principle which is unnecessary to advance the goals of a statute defies the concept of fair play.

## III.

I believe this court, as in *Gambell I,* is not giving the trial court adequate guidance. In footnote 2 of its opinion, the majority states that "[i]n the absence of a fully developed trial record, we cannot now decide whether a permanent injunction should issue in this matter." Such a statement leads me to ask: What additional facts are necessary? Can the appellants produce any additional evidence that will be relevant to the decision whether a permanent injunction should be issued? I think not. The majority holds that a violation of environmental statute, absent exceptonal circumstances, requires that an injunction be issued. The majority finds that no exceptional circumstances exist here and that the Secretary of Interior has violated an environmental statute. Therefore, under the majority's holding, a permanent injunction must be issued.[4]

This court should also tell the trial court what will constitute acceptable compliance. That is, will a section 810 analysis performed *after* a lease sale satisfy the statute's requirements? This issue is critical because the Department of Interior complied with the requirements of section 810

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[4]The majority states that if it were to decide this issue it would be usurping the function of the district court. I cannot agree that providing the trial court with adequate guidance as to the proper application of the law can ever be characterized as usurping its function.

but did so after the lease sale.[5] If a post-sale section 810 analysis will not satisfy the statute's requirements, the sales of Lease Nos. 57 and 83 must be voided. If a post-sale section 810 analysis is satisfactory, then the majority should clearly state this. Then the trial court, on remand, could determine whether the two studies done after the sale are adequate. Such a holding would not require that post-sale compliance would always be satisfactory. Under the circumstances of this case, however, allowing post-sale compliance may well be appropriate. In future lease sales, post-sale analysis may not be satisfactory since the Department of Interior now has notice that it must comply with section 810 before such sales.

The majority fails to address this issue. Consequently, the trial court will be forced once again, as it was after *Gambell I,* to decide a question of law. The losing party will appeal which will result in more delay and uncertainty as to the parties' rights. Because this issue has not been resolved, we will, in all probability, see *Gambell III* before Rambo III. I therefore dissent, respectfully.

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[5]Less than six months after *Gambell I* was decided, the Department of Interior performed a section 810 analysis for Lease No. 57 finding that the sale would not significantly restrict subsistence uses. Less than one month after *Gambell I,* the Department performed an OCS Environmental Assessment which included a section 810 analysis for Exxon's, ARCO's, and Amoco's plans of exploration for tracts in Lease No. 83. In that assessment, the Department of Interior found that the exploration proposals of the three oil companies would not significantly restrict subsistence uses.

## APPENDIX C

IN THE
**UNITED STATES DISTRICT COURT**
FOR THE DISTRICT COURT OF ALASKA

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**A85-184 CIV**

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THE PEOPLE OF THE VILLAGE OF GAMBELL, an Alaskan Native IRA Association, and THE PEOPLE OF THE VILLAGE OF STEBBINS, an Alaskan Native IRA Association,
*Plaintiffs,*

vs.

DONALD P. HODEL, Secretary of the Interior, and THE UNITED STATES DEPARTMENT OF THE INTERIOR,
*Defendants,*

ARCO ALASKA, INC., *et al.*,
*Intervenor-Defendants.*

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**A85-201 CIV**

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THE PEOPLE OF THE VILLAGE OF GAMBELL, an Alaskan Native IRA Association, and NUNAM KITLUTSISTI, A Native Intertribal Organization,
*Plaintiffs,*

vs.

DONALD P. HODEL, Secretary of the Interior, and THE UNITED STATES DEPARTMENT OF THE INTERIOR,
*Defendants,*

AMOCO PRODUCTION COMPANY, *et al.*,
*Intervenor-Defendants.*

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**MEMORANDUM AND ORDER**

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THIS CAUSE comes before the court on plaintiffs' motions for preliminary injunction. In these motions plaintiffs allege that the Secretary violated § 810 of ANILCA in approving Lease Sale 57 in Norton Sound and Lease Sale 83 in the Navarian Basin. For the reasons stated below, the court finds that a violation of ANILCA occurred in each case, but that an injunction is not the appropriate form of relief. As a preliminary matter, intervenor-defendants' request for oral argument is denied to expedite the business of the court. Local Rule 5(C)(1).

The Ninth Circuit recognizes two sets of standards for evaluating claims to injunctive relief, which it has termed the "traditional" and the "alternative" tests. The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?

The "alternative" test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983).

## I. INITIAL MATTERS

The court finds it has jurisdiction over the above actions. The provisions of 43 U.S.C. § 1349(c)(1) and (2) do not apply for the reasons stated in *People of the State of California v. Andrus,* 608 F.2d 1247, 1248-49 (9th Cir. 1979). The court also finds that laches is not applicable in that plaintiffs were reasonably diligent in bringing these actions. Finally, contrary to plaintiffs' assertions, the court finds that the Ninth Circuit did not reach the merits of whether an ANILCA violation occurred in Lease Sale 57. *See People of the Village of Gambell v. Clark,* 746 F.2d 572, 582-83 (9th Cir. 1984).

## II. ANILCA'S SUBSTANTIVE EFFECT

Plaintiffs argue that Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111-3126, (ANILCA) contains substantive requirements that the Secretary must follow in lease sale tract selection. However, Congress designed ANILCA § 810 as a procedural statute. ANILCA § 810(d), 16 U.S.C. § 3120(d); *Gambell*, 746 F.2d at 582. Once the Secretary has complied with its procedural requirements, substantive decisions will not be set aside unless they are clearly arbitrary and capricious. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Latham v. Brinegar*, 506 F.2d 677, 692-93 (9th Cir. 1974). There simply is no requirement that the Secretary must "limit his tract selection to those tracts with the highest oil and gas potential."

## III. ANILCA § 810: THE INITIAL REVIEW PROCEDURE

For all leases, § 810 requires the federal agency involved to evaluate (1) the effect of leases on subsistence uses and needs; (2) the availability of other lands for oil and gas leasing; and (3) other alternatives which would reduce or eliminate the effect on subsistence. *Kunaknana v. Clark*, 742 F.2d 1145, 1150-51 (9th Cir. 1984). The Secretary did make such a review here. The effect of the leases on subsistence and alternatives which would reduce or eliminate the impact on subsistence were discussed at some length in the respective EIS's for the lease sales. The availability of other lands was discussed in the context of the EIS for the Secretary's Five Year Leasing plan. *See* Intervenor-Defendants' Exs. B & C, Docket #90, A85-184. Nevertheless, since the Secretary violated ANILCA for the reasons cited below, the court does not decide today whether this discussion is sufficient under ANILCA.

The Secretary, however, assumed that ANILCA did not apply to Outer Continental Shelf (OCS) lands when he performed the above evaluations. Consequently, he did not

have the policy precepts of ANILCA in mind at the time of evaluation. The court finds that the Secretary cannot comply with ANILCA unless he evaluates the subsistence impacts of the leases with the mandate of ANILCA clearly in mind. *See Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982); *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434, 445 (9th Cir. 1976).

Congress, in enacting ANILCA, determined that previous environmental statutes and the executive branch were not providing sufficient protection for Native Alaskans' subsistence needs. *See Gambell,* 746 F.2d at 580. Title VIII of ANILCA was passed to remedy that lack of protection. It contains strong findings and policy statements favoring subsistence. ANILCA §§ 801, 802. In addition, Congress required that subsistence be considered prior to any public land disposition. *Id.* § 810; *see* S. Rep. No. 96-413, 96th Cong., 1st Sess. 234 (1979) (requirements of § 810 must be incorporated into land use planning process). This court must assume that, in passing Title VIII, Congress intended to alter the manner in which public decisions regarding land dispositions occurred. To assume otherwise would be to assume Congress intended a useless act. *See, e.g., Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977). Since the Secretary did not have the mandate of ANILCA clearly in mind, as was the case here, he could not have performed the lease sale evaluations in the manner Congress intended.

## IV. FINDINGS OF NO SIGNIFICANT RESTRICTION

Plaintiffs also allege that the Secretary violated ANILCA in failing to follow the notice, hearing, and finding requirements of § 810(a)(1)-(3). Those requirements must be followed whenever the agency concludes that the proposed action "may significantly restrict subsistence uses." *Kunaknana,* 742 F.2d at 1151. The defendants argue that the lease sales did not significantly restrict subsistence in

that the actions would cause no or only "slight" disruptions in user resources or access to resources. *See id.*

Defendants and defendant-intervenors further argue that the Secretary does not need to consider the impact of the lease's development and production phases in making this determination. The Ninth Circuit has held otherwise. In *Kunaknana* it stated:

> [8] We find that the agency examined the relevant factors and did not err in its judgment. The district court's decision includes findings of fact which evidence an articulated rational connection between the facts found [by the agency] and the choice made. *Id. See* CR 111 (Decision of Record). *The agency's decision-making process included the cumulative impacts of both the entire expedited leasing program and Lease Sale 931. This is evidenced by the fact that the agency removed certain lands, such as Caribou calving areas and Black Brant molting areas, from potential leasing and included stipulations regarding subsistence use in the leases.* The agency imposed these protective lease conditions and stipulations in order to preclude *future* restrictions on subsistence uses that might be caused by activity permitted by the NPRA-A leasing program.

*Id.* (emphasis added). Implicit in the above passage is the holding that ANILCA requires consideration of the "entire . . . leasing program," including development, at the lease stage.

In order to assure that procedural environmental statutes are implemented to the fullest extent possible, it is important that all environmental consequences be considered as early in the process as is meaningfully possible. *See Village of False Pass v. Watt*, 565 F. Supp. 1123, 1135-36, 1145 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984). As the court stated there:

> I note, however, that consideration at the leasing stage of potential or anticipated environmental con-

> sequences relating to exploration, development and production activities serves a number of important objectives. The inclusion into a leasing stage environmental impact statement of known environmental information relating to later exploration or development activities which may in some way bear significant relationship to the leasing decision or to the preliminary activities serves to alert the Secretary to any environmental consequences which may be irreversible. Information relating to potential or anticipated environmental consequences may also focus on the need to develop further information necessary for adequate discussion and consideration in an exploration or development and production environmental impact statement. Finally, the legislative scheme providing for several administrative decisions along the progression from leasing through production should not unnecessarily weaken the legislative objectives underlying the National Environmental Policy Act, the Endangered Species Act, the Marine Mammal Protection Act, or other acts serving to protect the environment. On the other hand, although known environmental consequences relating to a later stage ought to be included in a leasing stage environmental impact statement, it is not necessary to include information about environmental consequences which are conjectural or speculative, and will remain so until exploration or development.

*Id.* at 1145. *Accord, North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980). ANILCA, like the Endangered Species Act and NEPA, therefore requires that development and production impacts be addressed at the lease stage. To segment the lease sale process, as defendants suggest, would thus run counter to the process required for effective environmental review. *See also Thomas v. Peterson*, 753 F.2d 754, 759-60 (9th Cir. 1975) (requiring early consideration of environmental impacts in multi-phase project); *Village of False Pass v. Watt*, 733 F.2d 605, 608-09 (9th Cir. 1984) (ESA applies at lease stage).

*Secretary of the Interior v. California*, 104 S. Ct. 656 (1984), does not counsel to the contrary. The Supreme Court in that case ultimately depended on the unique statutory language and legislative history of OCSLA and the CZMA. Given that the court held that the ESA and NEPA continued to apply at the lease stage, it is probable that the court's holding was limited to the issue before it. *Id.* at 670. *See also* 43 U.S.C. § 1346(a), (d) (requiring study of environmental impacts prior to leasing).

**A. Lease Sale 57**

In preparation for this litigation, the Minerals Management Service prepared an ANILCA § 810 "significant restriction" study. In this study, the MMS found that the lease and exploration stages will not significantly restrict subsistence, but that development and production "may significantly restrict subsistence uses in certain areas" if oils is discovered. *See* Def. Ex. A at 3. Given that the agency found a significant restriction on subsistence may occur, the notice, hearing and findings requirement of § 8109(a)(1)-(3) are triggered. The failure of the agency to follow those procedures is a violation of ANILCA. *See* 5 U.S.C. § 706(2)(A) & (D).

**B. Lease Sale 83**

In the FEIS prepared for Sale 83, the Secretary specifically found that for the lease sale, including development and production, "[i]mpacts on subsistence patterns from the proposal are negligible to nonexistent." FEIS at IV-84. Plaintiffs challenge this finding on the grounds that this conclusion is inconsistent with other findings in the FEIS and Secretarial Issue Document (SID). Elsewhere, the FEIS states:

> Pinnipeds breeding, migrating, and molting in the lease area when ice is present could experience substantial losses from oilspills or disturbance. Walrus, and perhaps ribbon seals could experience moderate regional effect. . . .

*Id.* at IV-42. The FEIS also noted that under a worst case analysis, "one third of the entire bowhead whale population could be exposed to adverse effects." *Id.* at IV-65.

The conclusion of no significant restriction, in face of the above findings, is not arbitrary and capricious. *See Kunaknana,* 742 F.2d at 1151 (stating standard of review).[1] The worst case analysis is speculative, and given the continuing requirements of the Endangered Species Act and Secretarial control over leasing, highly unlikely to occur. Any "moderate" affect on the walrus population is equally unlikely to affect subsistence, given the current abundance of the species. FEIS at IV-83. The court finds the Secretary considered the relevant factors and there was not a clear error of judgment.

## V. APPROPRIATE REMEDY

Absent unusual circumstances, an injunction is the appropriate remedy for the violation of a procedural environmental statute, such as ANILCA § 810. *Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985). Irreparable harm is presumed to flow to plaintiff by reasons of the violation. *Id.; Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984). Nevertheless, in unusual circumstances, an injunction may be inappropriate. *Forelaws on Board v. Johnson,* 743 F.2d 677, 686 (9th Cir. 1984); *State of Alaska v. Andrus,* 580 F.2d 465, 485-87 (D.C. Cir. 1978).

The court finds in the instant case:

(1) That delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil re-

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[1]Plaintiffs do not argue here that the Secretary's determination of "significant restriction" should be reviewed under the "rule of reason" and accordingly this court, like the *Kunaknana* court, does not reach the issue of whether arbitrary and capricious or the "rule of reason" is the correct standard of review. *Cf. Foundation for North American Wild Sheep v. United States Dept. of Agriculture,* 681 F.2d 1172, 1177 n.24 (1982) (applying "rule of reason" under NEPA).

sources and energy independence. Expedited exploration as a policy is stated in OCSLA. *See* 43 U.S.C. § 1332(3);

(2) That exploration will not significantly restrict subsistence resources; and

(3) That the Secretary continues to possess power to control and shape the off-shore leasing process. Therefore, if the ANILCA subsistence studies require alteration of the leasing conditions or configuration the Secretary will be able to remedy any harm caused by the violation.

Applying the traditional test for preliminary injunction the court finds:

(1) Movants have established a strong likelihood of success on the merits;

(2) The balance of irreparable harm does *not* favor the movants;

(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent.

Based on the above the court finds an injunction preventing oil exploration is inappropriate under the facts of this case.

Accordingly, IT IS ORDERED:

THAT plaintiffs' motion for preliminary injunction is denied.

DATED at Anchorage, Alaska, this 23rd day of May, 1985.

BY ORDER OF THE COURT:

JAMES A. VON DER HEYDT
UNITED STATES DISTRICT JUDGE

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*Chief Deputy Clerk*

# APPENDIX D

## JUDGMENT

## UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

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**No. 85-3877**
**A85-184 cons. A85-201**

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PEOPLE OF THE VILLAGE OF GAMBELL, PEOPLE OF THE VILLAGE OF STEBBINS, AND NUNAM KITLUTSISTI,
*Plaintiffs-Appellants,*

VS.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND U.S. DEPARTMENT OF THE INTERIOR,
*Defendants-Appellees,*

ARCO ALASKA, INC., AMOCO PRODUCTION CO., *et al.*,
*Defendants-Intervenor-Appellees.*

APPEAL from the United States District Court for the District of

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ALASKA (ANCHORAGE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED & REMANDED

Filed and entered October 25, 1985

## APPENDIX E

**List Required by Rule 28.1**

Amoco Production Company

Amoco Corporation
Amoco Company
Amoco Credit Corporation
Analog Devices Inc.
Cetus Corporation
Cyprus Mines Corporation

Arco Alaska, Inc.
Atlantic Richfield Company

ABE Beverage, Inc.
Agro International, S. de R. L. de C.V.
Almeg Extrusion Company, Inc.
Alpart Farms (Jamaica), Ltd.
Alumina Contractors, Ltd.
Alumina Partners of Jamaica
Alyeska Pipeline Service Company
Ambler Mining Company
Anaconda Exploration New Zealand Limited
Anaflex, S.A. de C.V.
Anamax Mining Company
Anamet, S.A. de C.V.
ARCO Australia Coal Pty., Ltd.
ARCO Chemical IBERICA, S.A.
ARCO Oil Limited
ARCO Solar Nigeria, Ltd.
Arilan, S.A. de C.V.
Arpet Petroleum Limited
A/S Skaland Graftiverk
Atlantic Richfield Oil Limited
Atlantic Richfield de Mexico, S.A. de C.V.
Aughinish Alumina, Ltd.
Aughinish Estates Limited
Aughinish Finance, Limited

Aughinish Property (Nominees), Limited
Badger Pipeline Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
British American Metals Company, Limited
Candel International, Limited
Caribou-Chaleur Bay Mines Ltd.
Caribou-Smith Mines Ltd.
Chile Copper Company
Cobre de Hercules, S.A.
Cobre de Mexico, S.A.
Cobrecel, S.A. de C.V.
Colonial Pipeline Company
Compania Minera Dos Repbulicas S.A. de C.V.
Compania Minera Kappa, S.A.
Compania Minera Penacobre, S.A.
Compania de Petroleo Ganso Azul, Ltda.
Cook Inlet Pipe Line Company
Copro San Luis, S.A. de C.V.
Curragh Coal Sales Co. Pty. Ltd.
Delaware Bay Transportation Company
Dexter de Mexico, S.A.
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
85819 Canada Limited
Eisenhower Mining Company
Empresa de Comercio Exterior Mexicano, S.A. de C.V.
Ericsson
Flower Street Limited
Gravity Adjustment, Inc.
Greater Pacific Limited
Griffith-Consumers Company
Hardy Oil Company
Imperial Eastman de Mexico, S.A.
Impulsora De Cobre, S.A. de C.V.
Indelta, S.A. de C.V.
Industrias Tecnos, S.A. de C.V.

Iricon Agency Ltd.
Jamaica Alumina Security Company Ltd.
Kenai Pipe Line Company
Kronos, Computation y Teleproceso, S.A. de C.V.
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Lingobronce, S.A.
Manufacturas de Cintas Metalicas, S.A.
Manufacurera Mexicana De Partes Para Automoviles, S.A. de C.V.
Mayflower Mining Company
Mexicana de Cospeles, S.A. de C.V.
R. W. Miller (Holdings) Limited
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica
Nacional de Cobre, S.A.
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
P. T. Arutmin Indonesia
Park City Ventures
Park-Cummings Mining Company
Park-Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Platte Pipe Line Company
Prince Consolidated Mining Company
Productos Especiales Metalicos, S.A.
Productos Laminados de Cobre, S.A. de C.V.
Richfield U.K. Petroleum, Limited
Rodman, Inc.
Saudi Cable Company
Servicios Industriales Nacobre, S.A.
Sinclair (U.K.) Oil Company Limited
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Sociedade Anonima Marvin
Solar Energy Center (E.C.)

Solvamex, S.A. de C.V.
Stup & Costello, Inc.
SUMIARCO Company Limited
Swecomex, S.A.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Transcobre, S.A. de C.V.
Trans Mountain Oil Pipe Line Company
Tubos Flexibles, S.A.
Union de Credito Industrial Vallejo, S.A.
United Park City Mines Company
The Walworth Company
West Mayflower Mining Company
William Prym de Mexico, S.A.

Exxon Corporation

Abu Dhabi Company for Onshore Oil Operations
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
AFCO AB
Aishin Sekiyu K.K.
Aktiebolaget Svensk Petroleumadministration
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
A/S Futurum
A/S Hydrantanlaegget Kobenhavns Lufthavn, Kastrup
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Atlas Supply Company
Atlas Supply Company of Canada Limited

Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
B. V. Autoservicebedrijf "de Beuk" Leimuiden
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdgasleitung G.m.b.H.
BEB Gewerkschaften Brigitta und Elwerath Betriebsfuhrungsgesellschaft m.b.H.
Bel-Air Entreposage S.A.
Building Products of Canada Limited
Byron Creek Collieries (1983) Limited
Canada Wide Mines Ltd.
Carnduff Gas Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Cia Refinadora Petrolera Santo Domingo, Inc.
Colmant Cuvelier Dodge S.A.
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en Cote. d'Ivoire S.A.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Daitsu Sangro K.K.
Delta Rope & Twine Limited
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Det Gronlandske Olieaktieselskab
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited

Dixie Pipeline Company
Dodge de Mexico S.A. de C.V.
Drivmedelscentralen Aktiebolag
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Ejendomsaktieselskabet af 12.juni 1964
Elwerath Erdol und Erdgas AG
Emirates Oilfield Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Entrepot Petrolier de l'Aveyron (E.P.A.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C.A.
Esso Chimie
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Italiana S.p.A.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S.A.
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
F. T. Giken Kabushiki Kaisha
Federal Pacific Electric de Mexico S.A. de C.V.
Federal Pioneer Limited
Ferngas Nordbayern G.m.b.H.
Derngas Salzgitter GmbH
Forenade Svenska Oljeimportorers AB
Forjas de Colombia, S.A.
415572 Ontario Inc. (operating as Kentom Steel)
Fuji Kogyo K.K.
Fuji Unyu K.K.
Fukui Sekiyu K.K.

General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane-Lavera
Gewerkschaft Brigitta
Gewerkschaft Elwerath
Gewerkschaft Elwerath & Co. GmbH.
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gilbarco do Brasil S.A.-Equipamentos
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier du Finistere G.I.E.
Groupement pour l'Etude d'un Pipeline Bordeaux Toulouse
Hankyu Ferry K.K.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Seikiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroschima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokuyu Sekiyu K.K.
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Immeuble Entretien Service I.E.S.
Imperial Oil Limited
The Imperial Pipe Line Company, Limited
Inada Ekka Gas Kabushiki Kaisha
Industrias Reliance S.A. de C.V.
Industry Promotion Enterprises Limited
Intecom, Inc.

Interface Mechanisms Inc.
Internationale Gas Transport Maatschappij B. V.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Iranian Oil Participants Limited
Iranian Oil Service (Holdings) Limited
Iranian Oil Service Limited
Iraq Petroleum Company, Limited
Iraq Petroleum POensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Niimi Kirun
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S ejendomsselskabet af 8 oktober 1967
K/S Hoje Taastrup Storcenter IIK/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Kawasaki Naiko Kabushiki Kaisha
Keihin Kygnus Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.

Kenarin Agencies Ltd.
Kenya Petroleum Refineries Limited
Kepco Mfg. Inc.
Kibo Sekiyu Hanbai K.K.
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricty Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kyngus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kyngus Sekiyu K.K.
Kyushu Eagle K.K.
LPL Investments, Inc.La Compagnie Electrique Pioneer du Quebec, Inc.
Lakehead Pipe Line Company, Inc.
Laykold Corporation
LEAG Aktiengesellschaft fur luzernisches Erdol
Les Docks des Petroles d'Ambes
Les Restaurants Le Voyageur Inc.
Long Beach Oil Development Company
Magota Sekiyu K.K.
Mainline Pipelines Limited
Makoto Sekiyu Kabushiki Kaisha
Maple Leaf Petroleum Limited
Maquinas de Coser y Bordar Sigma, S.A.
Mars-Alcatel, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
NPC Services, Inc.

Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Neptune Bulk Terminals (Canda) Ltd.
Niagara Structural Steel (St. Catharines) Limited
Nichimo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Norforge Inc.
Norsteel Limited
Northern Steel Co. Ltd.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Omnisport Australia International Pty. Ltd.
Omnisport B.V.
Omnisport International Inc.
Omnisport International (U.K.) Limited
Omnisport International (U.S.) Inc.
Omniturf Surfaces (N.A.) N.V.
107580 Canada Inc.

139675 Canada Limited
140129 Canada Limited
140233 Canada Limited
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Peteroleum Tankship Company, Inc.
Petrosvibri S.A.
Photonic Automation Inc.
Pinpoint Retail Systems Inc.
Pipeline Service
Pipeline Service Iran
Pipeline Service U.K.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Portland Pipe Line Corporation
Potencia Industrial S.A.
Productos Lorain de Mexico S.A. de C.V.
Progas A/S
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla S.A.
Reliance Electric & Engineering Company de Mexico S.A. de C.V.
Reliance Electric Limited
Reliance Electric S.A. (Spain)
Renix Co. Ltd.
Renown Building Materials Limited
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)

S.O.P.-Societa Oleodotti Padani S.p.A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanwa Kasei Kogyo Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S.A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
SEAG Aktiengesellschaft fur schweizerisches Erdol
Sibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Self-Service de Blaak B.V.
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Sekiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifants de Madagascar"-PROLUMA S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly

Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobilere "Les Casseaux-Bougainville"
Societe de al Raffinerie d'Alger
Societe de la Refinnerie de Lorraine
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S.A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Developpement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Depot Petrolier d'Hanconcourt
Societe du Parking du Square Boucicaut
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petroliers S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera

Suddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Suntech Company, Ltd.
Supertex, Inc.
Svensk Petroleumlagring Tre Aktiebolag
Sydis, Inc.
Syncrude Canada Ltd.
Synergistics Chemicals Limited
305120 Alberta Ltd.
346877 Ontario Limited
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A.G., Mellingen
Tanklager Altishausen A.G.
Tanklager Gesellschaft
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
TecSyn International Inc.
Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tokai General Sekiyu Hanbai K.K.
Toko Sekiyu K.K.
Toledo Scale Company de Mexico S.A. de C.V.
Toledo Werk GmbH
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha

Tonen Technology K.K.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Trans-Arabian Pipe Line Company
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG-Unterflurbetankungsanlage Flughafen Zurich
Ulupna Estates Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Pty. Ltd.
W.H. Adam, Ltee, Ltd.
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Westdeutsche Erdolleitungs-G.m.b.H.
Westgas G.m.b.H.
Williamsport Properties Limited
Winnipeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke-Rodewald G.m.b.H.
Worex Distribution
Worex et Cie
Worex S.A.R.L.
Wrenford Insurance Company Ltd.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Keisha Nishi Kobe Bosai Center
A.B.C.-Azienda Briantea Carburanti S.r.l.
Administravia Industrias Relianoe S.A. de C.V.
Association Petroliere, Belge
Azienda Carburanti Lubrificanti Affini, S. p. A.-Milano (ACLAM)
Beaverhill Resource Limited
Computer Centrum Groningen B.V.

D.O.C. Dutch Offshore Consortium B.V.
Dai Nippon Jushi Kabushiki Kaisha
Demulsificantes Del Orinoco, C.A.
Engycalor-Energia Calore S.r.l.
Esso Chemical Alberta Limited
Esso Reunion
Exxon S.r.l.
FALCA S.p. A.
Gasunie Engineering B.V.
I.C.I.O.M.-S. p. A.-Importazione Carboni Industria Olii Minerali
Ivrea Petroli Affini Gas (I.P.A. Gas) S. r. l.
Leco Inc.
Limburgsche Maatschappij voor Gasdistributie Limagas N.V.
Maasvlakte Olie Terminal N.V.
Maasvlakte Coal Terminal B.V.
Maatschappij voor Intercommunale Gasdistributie Intergas N.V.
Maatschappij voor Intercommunale Gasvoorziening in Oost-Brabant "OBRAGAS
Mediterranea Bitumi, S. p. A.
NAM- K 7 B.V.
NAM-K 14 B.V.
NAM-K 15 B.V.
NAM/CLOMS-K 8/K 11 B.V.
NAM/CLOMS-L 13 B.V.
N.V. Nederlands Gasunie
Nederlands Aardolie Maatschappij B.V.
Oil Spill Response Limited
Rotterdam Antwerpen Pijpleiding (Belgie)
S.C.O.C.-Societa Commercio Olii Combustibili S. p. A.
Societe Belge de Transport par Pipeline
Standard Oil S.r.l.
Tanklager Gesellschaft, Koln
Toscana Lavorazione Petroli S. p. A.
Union des Raffineurs Belges "U.R.B."
Wartempomp Nederland B.V.
Westgastransport B.V.

Worex

Mobil Exploration & Producing Services, Inc.
Mobile Corporation
Mobil Oil Corporation

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama, A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ammenn GmbH
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian Energy Company Limited, The
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Saraha S.A.
Australian Synthetic Rubber Company Limited

Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheeramaatschappij MOBEM
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Beer GmbH
Beer GmbH & Co. Mineralol-Vertriebs-KG
Bosques Nacionales, Ltda.
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
CAS (Combined Automation Systems) B.V.
Celmimia Shipping Corporation
Celulosa y Papel de Colombia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercers S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Comet-Brennstoffdienst GmbH
Commercial Polymers Pty. Ltd.
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA

Compania Colombiana De Forestacion S.A.
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
Corrugadora de Carton, S. A.
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
Dearborn Land Company
De. Ba. S.p.A.-Industria Petrolifero Deposito di Bari
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Pentosin-Werks GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Emoleum (Asphalts) Limited
Energas S.r.l.
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefobvre
Erdgas-Yerkaufs-Gesellschaft GmbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook

Etablissments Bouthenet
Ets. Le Goff
Ets. R. Saillard
Europetrol S.p.A.
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Fibil, S.A.
Fibras Internacionales de Puerto Rico, Inc.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
Frome-Broken Hill Company Proprietary Limited
Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gatwick Refueling Services Limited
Gas Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
Haniel Handel GmbH
H. van der Heijden Service Stations B.V.
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imbert G. Distribution De Produits Petroliers
Inmunizadoras Unidas, S. A.
Industria De Carbon Del Valle Cauca, S.A.
Industria Interamericana De Filtros Ltda. (INTER-FIL)

Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Iside, S.p.A.
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Italoil S.p.A.
Japan Airport Fueling Service Co. Limited
J.E.C.O.P.
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kygnus Sekiyu Hambai K.K.
Kawasaki Kygnus Sekiyu Hambai K.K.
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Seikyu Kabushiki Kaisha
Kyokyto Petroleum Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Leporati S.p.A.
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Loba Chemie Gesellschaft mbh
Lubricantes del Sur, S.A.
Marceaux & Cie
Matoo Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mertl GmbH
Mineralol-Handels-Gesellschaft Mbh

Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Maroc
Mobil Oil Nigeria Limited
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Near East Development Corporation
Neptune Bulk Terminals (Canada) Ltd.
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nottingham Gas Limited
Nuova Europetrol S.p.A.
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oilkol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Berau Coal

P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Paul Harding Mineralole GmbH & Co. KG
P.G-Groep B.V.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petrol Fuel S.p.A.
Petrolrif S.p.A.
Petromin Lubricating Oil Co.
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe Line Banal de La Goulette
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Co., LTD
Reforestadora Andina, SA
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Road Binders (Proprietary) Limited
Rohol-Aufsuchungs Gesellschaft mbH
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Santa Clara Waste Water Company
Sanwa Kasei Kogyo Kabushiki Kaisha
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited

Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushi Kaisha
SENRCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
Sociedad Calle 67, Ltda.
Sociedade Portugal Marrocos SARL
Societe Italiana per L'oleodotto Transalpino, S.p.A.
Societe Africane de Raffinage
Societe Alfred Ott & Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Loclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobilere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Dahomeenne d'Entreposage de Prodùits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Gastion des Stocks Petroliers de Cote D'Ivorie
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff

Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Materialx d'Etanchoitze Pour Le Entreprises (Maple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage de Petrolier Oau Brundi
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirenne de Raffinage
Societe Mauritaneinne d'Entreposage de Produits Petroliers
Societe Malienna D'Entreposage (SME)
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle pour l'Epuration des Huiles de Transformateurs-Septra
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togoliase d'Entreposage (STE)
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saakatchewan Pipe Line Company

Stratjford Transport, A.S.
Sydney Metropolitan Pipeline Ety. LTD
Syria Petroleum Company Limited
System Plaza Inc.
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
T. M. Duche Co., Inc.
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Maintenance Kabushiki Kaisha
Tonen Kekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centraficaine de Gestion (TOCAGES)
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Celleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Palm Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Walton, Gatwick Pipeline Company Limited
Werner Weidemann Mineraloelvertrieb G.m.b.H.
Western Platinum Ltd.

West London Pipeline & Storage Limited
West Shore Pipe Line Company
Wilhelm Mertl GmbH & Co. KG
Wolverine Pipe Line Company
WBG, Warmeservice Gmbh
Wyco Pipe Line Company
Wymondham Oil Storage Co., Limited
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

Shell Western E&P, Inc.
Shell Oil Company

Butte Pipe Line Company
Cortez Capital Corporation
CRI Ventures, Inc.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Fractionation Research, Inc.
General Hydrocarbon Polymer Concrete Inc.
George Newman & Company
Glass-Steel, Inc.
Glastrusions, Inc.
Grande Ecallie Land Company, Inc.
Gravecap, Inc.
Heat Transfer Research, Inc.
Huntsman Chemicals, Inc.
Inland Corporation
Knytex, Inc.
Locap, Inc.
Lone Star Polymer Concrete Corporation
LOOP, Inc.
MESBIC Financial Corporation of Houston
Morrison Molded Fiber Glass Company
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Olympic Pipe Line Company

Pecten Cameron Company
Pioneer Equipment Co.
Plantation Pipe Line Company
Plastibeton, Inc.
Polycon Research, Inc.
Premix/E.M.S. Inc.
Quazite Corporation
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum N.V.
Shell Transport and Trading Company
Thums Long Beach Company
United Scientific, Inc.
Van Salt Water Disposal Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyoming Industrial Development Corporation

Sohio Slaska Petroleum Co.

The Standard Oil Company
Kennecott Corporation
Ress Realty Company
S. Minerals, Incorporated
Sohio Development Company
Sohio Chemicals & Industrial Products Company
Carborundum ASC Company (formerly Webb Paraguay, Inc.)
Carborundum Carobbean, Inc.
The Carborundum Company, Incorporated
The Carborundum Company of Puerto Rico
Carborundum Environmental Systems Canada, Ltd.
Carborundum International S.A.
Carborundum International Sales Corporation
Chase Nuclear (Canada) Limited
D-O Holding Company, Inc.
Dorcon (Canada) Limited
Dorr-Oliver (Brasil) Ltda.
Dorr-Oliver de Mexico, S.A.
Dorr-Oliver Engineering, Ltd.

Dorr-Oliver Export Company
Dorr-Oliver Incorporated
Dorr-Oliver (India), Limited
Dorr-Oliver International Inc.
Hindustan Dorr-Oliver Limited
Hitachi-Carborundum Yugen Kaisha (Hitachi-Carborundum Company)
Keeler/Dorr-Oliver Boiler Company (formerly E. Keeler Company)
Kennecott Canada Limited
Kennecott Ventures, Inc.
The National Filter Media Corporation
Performance Systems, Inc.
Pfaudler-Balfour, Limited
Pfaudler Development Corporation
QIT-Fer Et Titane Inc.
Quebec Metal Powders Limited Les Poudres Metalliques Du Quebec, Limitee
Seven Hundred Seven Development Corporation
Sohio Chemical Company
The Vistron Supply Company
Franklin Coal Company
Hinch Coal Mining Company
Kitt Energy Corporation
Old Ben Coal Company
Pike Coal Company
Royal Land Company
Upper Kittanning Inc.
Atlas Supply Company
BP Oil Inc.
Colonial Pipeline Company
Delaware Bay Transportation Company
East Texas Salt Water Disposal Company
Huron Liberian Company
Inland Corporation
Iricon Agency, Limited
Laurel Pipe Line Company
Miami Valley Corporation
Mid-Valley Pipeline Company

Mountaineer Carbon Company
Prospect International, C.A.
Sohio Alaska Transportation Company
Sohio Gas Pipeline Company
Sohio-Iran Trading, Inc.
Sohio Pipe Line Company
Sohio Supply Company
Sohio Transportation Company
Sohio Venezuela Company
Sohio Western Crude Oil Company
SPC Shipping Inc.
Truckstops Corporation of America
West Texas Gulf Pipe Line Company
BP Alaska Inc.
BP Communications Alaska Inc.
Sohio Alaska Petroleum Company
Sohio Algeria Company
Sohio Algeria Supply Company
Sohio de Colombia Company
Sohio Construction Company
Sohio Petroleum Company
Webb de Colombia, S.A.
Webb Drilling Company
Webb International Minerals, Inc.
Webb Tonga, Inc.
Monitor Insurance Company Limited
Sohio/BP Trans Alaska Pipeline Capital Inc.
Sohio Finance Company
The Standard Oil Company (Ohio) International N.V.
Kennecott
Apache Powder Company
Braden Copper Company
British Columbia Molybdenum Limited
Cobre Caribe S.A.
Denham Coal Management Pty. Ltd.
E. T. Irrigating Canal Company
Kenn Development Corporation
Kennarctic Explorations, Limited
Kennco Explorations, (Canada) Limited

Exploration Kennco, (Canada) Limitee
Kennco Explorations, (Western) Limited
Kennco (Stikine) Mining Limited
Kennecott Communications Corporation
Kennecott Explorations (Australia) Ltd.
Kennecott Explorations (New Zealand) Limited
Kennecott Minerals Company
Kennecott Phosphate, Inc.
Kennecott Santa Fe Corporation
Lark Water Users
North Jordan Irrigating Company
San Pedro Mining Company
Sohio Western Mining Company
Stikine Copper Limited
Utah and Salt Lake Canal Company
Ferix Corporation
Sohio Alternate Energy Development Company (formerly Sohio Coal Conversion Company)
Sohio Commercial Development Company
Sohio Shale Oil Company
Sohio Ventures Corporation (fomerly Vista Ventures Corporation)

Texaco Inc.

Abu Dhabi Asphalt and Lubricants Company, Limited
Aircraft Fuel Supply B.V.
Airport Refueling Services S.p.A.
AK Chemie GmbH
AK Deutsche Steinkohlenreviere GmbH
Aktiebolaget Djurgardsberg
Alberta Products Pipe Line Ltd.
American Overseas Petroleum Limited
Arabian American Oil Company
Associated Octel Company Limited, The
Association Petroliere Belge
AT&S Exploration Ltd.
Australian Lubricating Oil Refinery Limited
Aviation Fueling Services S.A.
Aviation Fuel Services Ltd.

Aviation Service Center
Badger Pipe Line Company
Bahrain National Gas Company (B.S.C.)
Bahrain Petroleum Company B.S.C. (Closed), The
Batangas Land Company, Inc.
Bayswater Nominees Pty. Limited
Bergemann KG
Boske & Co. Mineralolhandel GmbH
Braunkohle-Benzin AG
Bremer Mineralolhandel GmbH
Bunkerservice Brunsbuttel GmbH
Butte Pipe Line Company
Caltex Australia Limited
Caltex Deutschland GmbH
Caltex Mediterranean Limited
Caltex Petroleum Corporation
Caltex (Philippines) Inc.
Caltex Tanker Company (Australia) Pty. Limited
Canyon Reef Carriers, Inc.
Central African Petroleum Refineries (Private) Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chisholm Pipeline Company
Cla. Refinadora Petrolera Santo Domingo, Inc.
City Parkeergarage (City Parking) B.V.
Colonial Pipeline Company
Compagnie d'Entreposage Communautaire (C.E.C.)
Condea Chemie GmbH
Cynthia Gas Gathering Company Limited
Dannenberg & Co. Mineralolhandel GmbH
Deutsche Texaco Aktiengesellschaft
Deutsche Transalpine Oelleltung GmbH
Deutscher Kraftverkehr Ernst Grimmke GmbH
Dixie Pipeline Company
Drivmedelscentralen A.B.
El Capitan Mutual Water Company
Emirates Bunkering & Bitumen Company (Private) Ltd. "EBCO"
Erdgas-Berkaufs-GmbH

Explorer Pipeline Company
Fabricacion y Distribucion de Productas, S. de R. L. (FADIPCO)
Farmer Construction Limited
Federated Pipe Lines Ltd.
Felix Oil Company
Flexlbox GmbH
Forenade Svenska Oljeimportorers AB (FSOA)
Ghana Bunkering Services Limited
Gibson Holdings, Ltd.
Glen Park Gas Pipe Line Company Limited
Great Eastern Oil Ltd.
Hamburger Mineralol-Transport GmbH
Heddington Brokers Limited
Helzkraft Mineralol GmbH
Hertfordshire Oil Storage Limited
Honam Oil Refinery Company, Limited
Hunter Pipe Line Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iricon Agency Ltd.
Karl Becker & Co. Mineralolhandel GmbH
Karlsruhe-Stuttgart Rohrietung GmbH
Kashima Selkansho Co., Ltd.
Kaw Pipe Line Company
Kenya Petroleum Refineries Limited
Koa Oil Company, Limited
Koa Oil Overseas Co., Ltd.
Koa Petro. Gas Co., Ltd.
Knoops & Muller Mineralolhandel GmbH
Kudamatsu Joint Disaster Prevention Center
Kux & Krahn Mineraloele GmbH
Laurel Pipe Line Company
LOOP, Inc.
LOCAP, Inc.
Louis Hagel Mineralol-Handels-GmbH
LPG de Panama, S.A.
Lublend Limited
Maghrab Gaz S.A.

Mainline Pipelines Limited
Majik Markets Pty. Limited
Mdina Weave Ltd.
Mediterranean Refining Company
MHB Mineralolhandel GmbH
Milan Airport Refueling Services S.p.A. (MARS)
Mitsui Petro-Chemical Co. Ltd.
Mitsui-Texaco Chemicals Co. Ltd.
Montreal Pipe Line Limited
Motorway Services Ltd.
N. V. Rotterdan-Rjin Pijpleiding Maatschappij
Newcastle Pipeline Company Limited
New Zealand Refining Company Limited, The
Nippon Oil Staging Terminal Company, Limited
Nippon Petroleum Refining Company, Limited
Northern Tier Pipeline Company
Olympic Pipe Line Company
OMW Oberrheinische Mineralolwerke G.m.b.H.
Osaga Pipe Line Company
PT Caltex Pacific Indonesia
Pakistan Refinery Limited
Pars Investment Corporation
Pembroke Capital Company Inc.
Petrogas, S. A.
Philippine Petroleum Corporation
Phoenlcia Oil Company S.A.L.
Pipelines of Puerto Rico, Inc., The
Plastumar
Portland Pipe Line Corporation
Promotor de la Interconexion de las Gasoductos de la Costa Atlantica-"Promigas," S.A.
Quimica Industrial "FIDES" S. A.
Ranhoku Joint Disaster Prevention Center
Refineria Texaco de Honduras, S. A.
Rheem del Ecuador C. A.
Rhein-Main-Rohrietungstransportgesellschaft mbH
Royko Co., Ltd.
Ryoko Shoji Co., Ltd.
Sakae Kigyo Co., Ltd.

Salland Olie Maatschappij B. V.
Saudi International Petroleum Carrier Ltd.
Seminole Pipeline Company
Sierra Leone Petroleum Refining Company Limited, The
Singapore Refining Company Private Limited
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa Italiana per l'Oleodotto Transalpino
Societa per Azioni Raffineria Padana Olil Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Agricole des Enterprises Petrolieres (SADEP)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe Beige de Transport Par Pipeline
Societe Camerounaise des Depots Petroliers (SCDP)
Societe Dakroise d'Entreposage S. A. (SDE)
Societe de Cabotage Petrolier (PETROCAB)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe de Manutention des Carburants Aviation Dakar-Yoff (SMACADY)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe du Pipeline Sud-Europeen S.A.
Societe Gabonaise d'Entreposage de Produits Petroliers S. A. (SGEPP)
Societe Gabonaise de Petrole Texaco (S.A.R.L.)
Societe Gabonaise de Raffinage (SOGARA)
Societe Guineenne de Lubriflants et d'Embaliages (SOGUILUBE)
Societe Iviorienne D'Avltaillements Portuaries (SIAP)
Societe Ivoirienne D'Entreposage de Produits Petroliers (SIEPP)
Societe Ivoirienne de Futs et d'Embaliages (SIFEMBAL)
Societe Ivoirienne de Raffinage S.A. (SIR)
Societe Malienna d'Entreposage (SME)

Societe Nationale de Raffinage (SONARA)
Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)
Societe Togolaise d'Entreposage S.A. (STE)
South African Oil Refinery (Proprietary) Limited
Star Holdings Company Limited
Steag AG
Sungho Real Estate Company, Limited
Svensk Petroleumadministration A/B
Svensk Petroleum Forvaltning Aktiebolag
Svensk Petroleumlagring Tre AB
Sydney Metropolitan Pipeline Pty. Limited
Tadlagaz S.A.
Tankanlage Ruemlang AG (TAR)
Tanker Mooring Services Company Private Limited
Texaco Agro-Industrial (Nigeria) Limited
Texaco Alaska Inc.
Texaco Canada Inc.
Texaco Exploration Norawy A/S
Texaco Gabon
Texaco Ghana Limited
Texaco Maroc
Texaco Mexicana, S.A. de C.V.
Texaco Mineralolhandel Rhein-Hessen GmbH
Texaco Nigeria Limited
Texaco Norway A/S
Texaco Portugal Prospeccao e Producao, S.A.R.L.
Texaco Togo
Texas-New Mexico Pipe Line Company
Texoma Pipe Line Company
Thai Oil Refinery Company Limited, The
Thums Long Beach Company
Tide Water Oil Company (India), Limited
Toko Shokai Co., Ltd.
Tokyo Tanker Company, Limited
Total Centreafrincaine de Gestion (TOCAGES)
"Total-Texaco Mail" Societe de Distribution de Produits Petroliers
Transalpine Finance Holdings, S. A.

Transalpine Olleitung in Osterreich GmbH
Trans-Northern Pipelines Inc./Pipelines Trans-Nord Inc.
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited
Trinmar Limited
Trintovac Developments Limited
204383 Enterprises LImited
Union des Raffineurs Beiges
Union Oil Co., Ltd.
United Kingcom Oil Pipelines Limited
Unterflur-Betankungsanlage-A.G. (UBAC)
Warwickshire Oil Storage Limited
Wascana Pipe Line, Inc.
Wascana Pipe Line, Ltd.
West Australian Natural Gas Pty. Limited
West Australian Shore Pipe Line Company
Wichmann Beteiligungs-GmbH
W. Knierim & Co. Mineralolhandel GmbH
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Services des Entreprises Petrolieres (Zaire S. E. P.)
Zaire-Texaco S. A. R. L.
Zerssen Minerolhandel GmbH

Union Oil Company of California

Kaneb Services, Inc.
Magma Power Company
Union Exploration Partners, Ltd.

(2) (1)

Nos. 85-1239, 85-1406

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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DONALD P. HODEL, SECRETARY OF THE INTERIOR; and
THE UNITED STATES DEPARTMENT OF THE INTERIOR,
AMOCO PRODUCTION COMPANY, et al.,

*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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Nos. 85-1239, 85-1406

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DONALD P. HODEL, SECRETARY OF THE INTERIOR; and
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*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti oppose the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### STATEMENT OF THE CASE

This case involves the hunting and fishing rights of Alaska's aboriginal people. The plaintiffs, here the respondents, seek to ensure that the statutory and common law protections for these

rights are applied fairly and consistently. Three in number, they are the tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti. The tribal villages of Gambell and Stebbins are federally recognized Indian Tribes organized under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The village of Gambell is located on St. Lawrence Island, an island located near the Soviet Union in the Bering Sea. The village of Stebbins is located on the northeastern shore of the Yukon River Delta, bordering Norton Sound. Nunam Kitlutsisti is an intertribal organization representing 56 villages in the Yukon-Kuskokwim Delta. Literally the "defender of life and land," its purpose is to promote and protect the traditional hunting and fishing rights of its members.

All legal questions presented by this case involve two statutes. One is the Alaska Native Claims Settlement Act.[1] The other is Title VIII of the Alaska National Interest Lands Conservation Act.[2] Both affect the hunting and fishing rights of Alaskan Natives. The Claims Settlement Act extinguished Alaska Native aboriginal hunting and fishing rights "in Alaska." Title VIII of the Conservation Act protects the hunting and fishing rights extinguished by the Claims Act. Described as a "'settlement' of the Alaska Native aboriginal hunting and fishing rights seemingly extinguished by ANCSA,"[3] the Conservation Act protects Native hunting and fishing rights "in Alaska."

That these issues arise in a challenge to two OCS lease sales is both fitting and proper in light of the extensive use of sea areas by Alaska's aboriginal people. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. During this period the Eskimo treat the ice as a mere extension of land. They build roads on the ice. They set up camps on it. Most importantly, they hunt and fish on it.[4] In fact, the ice and water have

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[1] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, *codified at* 43 U.S.C. § 1601 et seq.

[2] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. § 3101 *et seq.*

[3] D. Case, ALASKA NATIVES AND AMERICAN LAWS 299 (1984).

[4] R. Nelson, HUNTERS OF THE NORTHERN ICE (1969).

traditionally yielded more resources to the Eskimo than the land. Along the Arctic coast the land is largely devoid of trees and other natural resources which can be used for housing or fuel. As a result, the Eskimo have relied on the sea to provide them with most of their food, clothing, fuel, and the basic materials for making hunting equipment such as kayaks and harpoons.[5] Immensely important, the sea is so central to the Eskimo that they recognize no sharp distinctions between land and water.

The hunting and fishing which occur in the coastal ice and water are critical to the well being of Alaskan Natives. Although the thought of fishing and hunting for one's sustenance may be a quaint anachronism for an industrial society, in rural Alaska it is a daily reality. There, cultural forces and lack of integration into the Western cash economy join together to make subsistence hunting and fishing the prime focus of life.

Subsistence is loosely defined as the harvest of wild resources to provide food and raw materials for personal use, sharing, and distribution to kin, in accordance with established custom and tradition.[6] A cyclical process, it begins when Alaskan Natives harvest fish and game. It continues as they directly consume it, share it, exchange it on local trade networks, or sell it for cash. Cash is then used to buy hunting and fishing equipment, with the process being completed when that equipment is used in further harvesting efforts. Large mammal hunting communities, such as Gambell and Savoonga on St. Lawrence Island, also obtain the cash needed to pursue their subsistence activities through the carving and sale of marine mammal by-products including whale bone, walrus ivory and oosiks, and baleen.[7]

Subsistence activities are indispensable to the economic well-being of the Native inhabitants of western Alaska and the Bering

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[5] *Id.*; N. Chance, THE ESKIMO OF NORTH ALASKA 9 (1966).

[6] *See* R. Little and L. Robbins, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: ST. LAWRENCE ISLAND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) (hereafter LITTLE AND ROBBINS). *See also* 16 U.S.C. § 3113 (defining "subsistence uses" for the purposes of the Conservation Act).

[7] LITTLE AND ROBBINS at 291-92.

Sea region.[8] Rural Native Alaskans have little access to the cash economy. Few can find jobs, for industry does not exist. Cash incomes must come from occasional wages, state or federal transfer payments, or a combined strategy in which one member of the family works while another hunts and fishes.[9]

Although Natives in rural Alaskan communities have limited incomes, living in the Bush is very expensive. The high cost of living is largely attributable to transportation costs. Distances between villages and regional centers are great; roads do not exist; weather conditions range between harsh and impossible. Goods must be transported by airplane or barge over great distances in inclement weather. Both methods are extremely expensive, and barges cannot operate in winter months when ports are frozen shut.

The net result of low incomes and a high cost of living is poverty. Native Alaska constitutes a Third World within the United States. Many Native Alaskans are fluent only in their native tongue, and most live under conditions unknown elsewhere in the United States. The poverty here is broad and deep. In 1978, the per capita income in the Norton Sound region (Wade Hampton) was only 16% of the average United States per capita income.[10] In practice, this poverty translates into a lack of social amenities such as bathrooms, running water, telephones, and standard housing.

Alaskan Natives have traditionally relied upon subsistence hunting and fishing to overcome this lack of economic opportunity. Because Alaskan Natives cannot afford to buy food, they must catch or kill it. Most western Alaskan Natives depend on the subsistence harvest of fish, marine mammals, birds, whales,

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[8] See generally LITTLE AND ROBBINS; A. Fienup-Riordan, NAVARIN BASIN SOCIOCULTURAL SYSTEMS ANALYSIS, Alaska OCS Socioeconomic Studies Program, Technical Report No. 70 (January 1982).

[9] *See, e.g.*, State of Alaska House Research Agency, PERSONAL INCOME IN THE LOWER YUKON-KUSKOKWIM REGION.

[10] U.S. Department of the Interior, FINAL ENVIRONMENTAL IMPACT STATEMENT. PROPOSED OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE 57, NORTON SOUND (1982) (hereafter FEIS) at Table III.B.4.13.

and other foods found locally, as their ancestors did for as long as the region has been humanly occupied.[11]

The importance of subsistence hunting and fishing to the economic viability of rural Native Alaskan communities can be understood by comparing cash incomes to the value of subsistence harvests. The value of food secured by subsistence hunting and fishing frequently exceeds cash incomes. In 1976, the annual value of a subsistence harvest for a family of four in western Alaska was $13,000. At the same time, the average cash income for the same family was approximately $5,263.[12] As this example indicates, Alaskan Natives could not feed their families should their subsistence activities be significantly disrupted.

In addition to its economic importance, subsistence hunting and fishing is central to the Eskimo's cultural survival.[13] To an Eskimo, language, culture, spiritual beliefs, customs, and respect for others and for oneself are all tied into a holistic worldview centered around the traditional hunting, fishing, and gathering way of life.[14] Hunting and fishing, sharing the harvest with family and fellow villagers, and acting as a harmonious part of the ecosystem are critical life activities.[15] Because subsistence is crucial, moderate or large-scale disruptions of subsistence activities are likely to result in significant adverse changes in the cultural well-being and stability of western Alaskan Native communities.[16]

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[11] FEIS at 47-48.

[12] R. Wolfe, AN ECONOMIC ANALYSIS OF FOOD PRODUCTION IN A WESTERN ALASKA COMMUNITY 23 (August 1977).

[13] FEIS at 48-49.

[14] *Id.*

[15] *Id.*

[16] LITTLE AND ROBBINS at Chapter XV; J. Jorgensen, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: NORTON SOUND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 90 (January 1984) at 327-354; *Village of Gambell v. Hodel*, 774 F.2d 1414, 1425 (9th Cir. 1985).

Congress has historically recognized the importance of subsistence harvests for Alaskan Natives.[17] This concern has been most recently expressed in Title VIII of the Conservation Act, a statute whose genesis can be traced to the Alaska Statehood Act. Passed in 1959, the Statehood Act provided that the State of Alaska could select up to 102.5 million acres of land — more than one-fourth of the State's 375 million acre land area.[18] Although the Statehood Act expressly provided that it would not affect existing Native claims, the expectations were that many of the State's selections would include traditional Native hunting and fishing grounds and that the State's selection process would *de facto* eliminate Native claims.[19]

Spurred into action by the Statehood Act, Native groups formed the Alaska Federation of Natives (AFN) in 1966. Upon formation, the AFN convinced Secretary of the Interior Stewart Udall to freeze state land selections until such time as the Native land claims were resolved. The freeze was upheld by the Court of Appeals for the Ninth Circuit in *Alaska v. Udall,* 420 F.2d 938 (9th Cir. 1969). It was continued under the Nixon administration by Secretary of the Interior Walter Hickel.[20]

Discovery of the Prudhoe Bay oilfield ultimately precipitated a settlement of Native land claims. When oil was discovered on the North Slope in 1965, the oil companies believed they needed a Trans-Alaska oil pipeline to get the oil to market. Their initial attempts to construct the pipeline were blocked, first by an environmental lawsuit and then by a suit filed by the Alaskan Natives. *Native Village of Allakaket v. Hickel,* Civil No. 705-70 (D. D.C. 1970). In this latter case, the District Court for the District of Columbia ruled that an Alaskan Native Indian Reorganization Act Association held possessory claims to land in the Yukon River Valley based on aboriginal hunting and fishing

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[17] *See* D. Case, ALASKA NATIVES AND AMERICAN LAWS at Ch. 7 (1984).

[18] J. Hanrahan and P. Gruenstein, LOST FRONTIER: THE MARKETING OF ALASKA 94 (1977).

[19] *Id.*

[20] *Id.* at 95.

rights, and that the Secretary of the Interior could not lease or otherwise dispose of that land without the Natives' consent.

A land claims settlement quickly followed this decision. Once the oil companies realized they could not build a pipeline without first settling the issue of Native claims, they lobbied heavily for an Alaskan Native land claims settlement.[21] With the support of the Nixon administration, but in the face of opposition from various environmental organizations, the oil industry and the Alaskan Natives secured the passage of the Alaska Native Claims Settlement Act in 1971.[22]

The heart of the Claims Act was the establishment of thirteen regional corporations and various village corporations. The Act awarded the regional and village corporations three major forms of compensation: a monetary settlement; rights to future payments from oil, gas, and mineral leases; and 40 million acres of unallocated federal lands. 43 U.S.C. § 1603; *Village of Gambell v. Clark,* 746 F.2d 572, 578-79 (9th Cir. 1984).

The *quid pro quo* was that Congress extinguished all Native claims "in Alaska." Sections 4(a), 4(b), and 4(c) of the Claims Act provide:

> (a) All prior conveyances of public land and water areas *in Alaska,* or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the state, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas *in Alaska,* or

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[21] M.C. Berry, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE CLAIMS 23, 163 (1975).

[22] J. Hanrahan and P. Gruenstein, *supra,* at 95.

> that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. §§ 1603(a), (b), and (c) (emphasis added).

The passage of the Claims Act was not expected to end federal protection of Native fishing and hunting rights. The land claims settlement was generous, but it had little relevance to most Alaskan Natives whose daily life revolved around hunting and fishing.[23] Recognizing this fact, Congress instructed the State of Alaska and the Secretary of the Interior to protect the subsistence needs of the Alaskan Native population.[24]

The protections did not materialize. Neither the Secretary nor the State of Alaska moved to protect the subsistence needs of Alaskan Natives. As a consequence, Congress was forced to act. It remedied the Secretary's and the State's misfeasance in 1980. Resurrecting language earlier deleted from drafts of the Claims Settlement Act,[25] it included in Title VIII of the Alaska National Interest Lands Conservation Act procedural and substantive protections for subsistence fishing and hunting.

The Senate Committee Report accompanying the Conservation Act describes why the statutory protections for subsistence hunting and fishing previously dropped from the Claims Settlement Act had to be placed in the Conservation Act. The report provides:

**OVERVIEW**

> Alaska's more than 200 rural villages are unique in that they are the last communities in the United States

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[23] *Id.* at 109.

[24] H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250.

[25] *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120.

in which a substantial number of residents are still dependent upon the harvest of renewable resources on the public lands for their sustenance. The importance of subsistence uses of such resources to the physical, economic and cultural well-being of Alaska Natives and other rural residents has been exhaustively chronicled in testimony presented at hearings, town meetings and workshops held by the committee during consideration of both the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act. The committee notes that the report of the Committee on Interior and Insular Affairs of the House of Representatives on H.R. 39 (House Report No. 95-1045, Part I, pp. 181-187) documents the importance of such uses in considerable detail.

HISTORY OF CONCERN

The Committee has had a long-standing concern for the protection of subsistence resources and uses in Alaska. In Section 21 of S.35, the Senate version of the Alaska Native Claims Settlement Act, the Secretary was directed to establish subsistence zones on the public lands, and, in circumstances in which subsistence resources or uses were threatened, to exercise his closure authority by prohibiting all consumptive uses of such resources within a zone except for subsistence uses by Alaska Natives. The conferees failed to adopt this provision in the conference report; however, the statement of the managers clearly established the intent of the Congress that the Secretary exercise his closure authority in a manner consistent with the purposes of Section 21.

S. Rep. No. 413, 96th Cong., 2d Sess. 230-31, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5174-75.

Title VIII implements this long-standing Congressional concern by providing a systematic and comprehensive scheme for protecting the hunting and fishing rights of Alaskan Natives.

The Act declares that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...." 16 U.S.C. § 3112(1). It states that all leasing and other land use decisions must allow, to the maximum extent possible, "the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.* To achieve these ends, the statute requires federal land managers to carefully evaluate the impact of leasing on subsistence uses and resources, and to identify alternative land selections before making any leasing decisions. 16 U.S.C. § 3120(a). For leasing that might significantly restrict subsistence activities, the land manager, before issuing any leases, must insure that: (1) the restriction is necessary; (2) the leasing involves the minimal amount of public land; and (3) reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources. 16 U.S.C. § 3120(a)(1)-(3).

Congress insured that the protections provided by the Conservation Act would be widely available. The Act applies to all conceivable federal interests, placing "lands, waters, and interests therein" under its umbrage. 16 U.S.C. § 3102(1). The geographic coverage is similarly broad. Mirroring and applying coextensively with the Claims Settlement Act from which it was derived, the Conservation Act protects all federal lands "in Alaska." 16 U.S.C. § 3102(3).

After Congress passed the Conservation Act in 1980, Alaskan Natives expected that Secretary Watt would heed its statutory directives and take the steps necessary to insure that their subsistence uses would not be unreasonably compromised. Their expectations were destined to be disappointed. Rather than addressing the subsistence uses and needs of Alaskan Natives, Secretary Watt proceeded to ignore them. His attitude was illustrated by his reaction to suggestions that OCS leasing might seriously disrupt the subsistence activities of Alaskan Natives. Responding to these concerns, he adamantly insisted that "35,000 people on the edge of the world" would not influence his plans to lease the Alaskan OCS.[25]

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[25] The Wall Street Journal, March 12, 1986, at 64.

In practice, Secretary Watt expressed his refusal to consider the subsistence uses of Alaskan Natives in connection with his OCS leasing program in an inconsistent and unfair application of Title VIII of the Conservation Act and Section 4(b) of the Claims Settlement Act. The inconsistency began in *Inupiat Community of the Arctic Slope v. United States.*[27] There, Inupiat Eskimo asserted aboriginal title to OCS lands which they had traditionally used and occupied. To defeat these aboriginal claims, Secretary Watt and the oil companies took the position that the Claims Settlement Act abolished aboriginal hunting and fishing rights outside the territorial waters of the State of Alaska. Claiming that the term "in Alaska" comprehended the OCS and included all lands lying between the high tide mark and the two hundred mile limit, the Secretary argued that a technical interpretation restricting the term "in Alaska" to anything less than the two hundred mile limit would be "tortured." The oil companies — also parties in that case — alleged that Congress had intended the phrase to be geographically descriptive and that such a use was "a perfectly natural one."

After adopting the position that the Claims Act applied to the OCS, Secretary Watt then proceeded to openly ignore the requirements of Title VIII. His theory was premised on the assumption — remarkable in light of the position taken in *Inupiat Community* — that the Conservation Act could not be interpreted as extending beyond the State's territorial waters. Without holding hearings or otherwise opening the administrative process to any public comment, he concluded that the term "in Alaska" was technically descriptive and did not apply to the OCS.

The tribal villages of Gambell and Stebbins called into question Interior's attempt to create a gap in the protections for the subsistence uses of Alaskan Natives when they filed this case on March 4, 1983. Their claim was simple. The term "in Alaska" had to be construed consistently and fairly. As used in two sister statutes — the Claims Settlement Act and Title VIII of the Conservation Act — the term was either geographically or technically

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[27] 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S. Ct. 68 (1985).

descriptive. If geographically descriptive, Title VIII applied to OCS leasing. If technically descriptive, Alaskan Natives retained their aboriginal hunting and fishing rights beyond the State's territorial waters because such rights had not been extinguished by the Claims Settlement Act.

The suit placed Interior and the oil companies in the impossible position of justifying an illogical and inconsistent application of an identical term in two sister statutes. Their resulting responses lacked grace. Before the tribal villages filed *Gambell I,* the Secretary and the oil companies had vigorously contended in *Inupiat Community* that it was "clear and unambiguous" that the phrase "in Alaska" referred to a geographic area lying between the high tide mark and the two hundred mile limit. After *Gambell I* was filed, they contended that the phrase could not possibly have that meaning, and that it was — of all things — "clear and unambiguous" that the term referred to a limited geographic area lying between the three mile limit and the high tide mark.

On appeal, Secretary Watt and the oil companies found themselves in the awkward position of presenting contradictory reasons why the Claims Act and Title VIII should be construed inconsistently and unfairly. The oil companies argued that the meaning of the term "in Alaska" was clear and unambiguous and that it did not include the OCS. They admitted that neither sections 4(a) nor 4(b) of the Claims Act — the sections which abolished aboriginal title — applied to the OCS. Yet they argued that either paramount federal authority or section 4(c) of the Claims Act, a section which abolished legal claims "based on claims to aboriginal title ... in Alaska," did abolish such title.

Secretary Watt took an entirely different position. He disputed the oil companies' claim that the meaning of the term "in Alaska" was clear and unambiguous on its face. Arguing that the term was opaque and otherwise totally ambiguous, he contended that the construction of both statutes had to be resolved by their legislative history. That history, he further argued, demonstrated that Congress intended for the same term in the two sister statutes to have totally opposite meanings.

The Court of Appeals for the Ninth Circuit understandably rejected these claims. It chose the consistent and fair interpretation

urged by the tribal villages — that the same term in the two historically-linked statutes had the same meaning. Eschewing the alternative of reading the term technically, it held that the term was geographically descriptive, encompassing areas outside as well as inside the territorial waters of the State.[18] Because the court found the phrase to be geographically descriptive, it determined that the Claims Settlement Act extinguished Native hunting and fishing rights outside the three-mile limit as well as that Title VIII of the Conservation Act protected the same rights in the same area. 746 F.2d at 579, 582.

The court of appeals did not, however, void the sale. Rather than take this step — as urged by the tribal villages — it chose to remand the case to the trial court for a legal and factual determination as to the appropriate remedy for the violation of the Conservation Act's prescriptions. The action was requested by the Secretary and the oil companies. To avoid having the lease sale summarily voided, both the Secretary and the oil companies had contended that the tribal villages would be entitled to an injunction should the court hold that the Conservation Act applied to OCS leasing. The Secretary had argued that the proper remedy was to enjoin exploration until such time as he complied with the requirements of the statute. The oil companies had gone farther, claiming that "If this court should hold that § 810 of ANILCA applies to the OCS, the appropriate remedy would be ... to enjoin further activities until the Secretary completes the procedures required by the statute...." 774 F.2d at 1417. In response to these arguments, the appellate court remanded the matter back to the district court for the limited purpose of deciding whether the sale should be voided or whether further activities should be permanently enjoined. 746 F.2d at 582-83.

A preliminary injunction should have issued automatically on remand. The remand order directed the district court to either void Lease Sale 57 or to permanently enjoin further exploration and development until Interior complied with the Conservation Act. Pending that determination, a preliminary injunction

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[18] *See Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*); *Inupiat Community of the Arctic Slope v. United States*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 68 (1985).

preserving the status quo as well as the district court's ability to fashion appropriate final relief would have been an imminently appropriate and necessary interim remedy. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981).

The Secretary and the oil companies had different ideas. In spite of their representation to the *Gambell I* court that an injunction was the proper remedy, they reversed their position on remand and argued that an injunction was not an appropriate remedy. They argued that Interior had fully and completely complied with the Conservation Act. The heart of their case was an inadvertent compliance claim. According to this notion, Interior had necessarily complied with all the requirements of the Conservation Act when it complied with the National Environmental Policy Act and the Outer Continental Shelf Leasing Act.

The district court rejected the inadvertent compliance argument but failed to issue the preliminary injunction which the remand order had so clearly contemplated. Expressing a natural skepticism that the Secretary could "inadvertently comply" with the Conservation Act, the district court judged that the Secretary had violated the statute on a number of counts. Chief among the violations were the Secretary's failure to prepare subsistence studies for the two challenged lease sales with the precepts of the Act clearly in mind and his failure to give the notice, hold the hearings, and make the findings required by sections 810(a)(1)-(3) of the Conservation Act. Nevertheless, the district court failed to enter the injunction requested by the tribal villages. Without explaining or elucidating its reasoning or rationale, and without expressly balancing the equities, it summarily concluded that an injunction was not an appropriate remedy in the case.

The court of appeals reversed. Noting that Interior and the oil companies had previously represented to it that an injunction was the appropriate remedy, it proceeded to balance the equities. It found that the balance tipped decidedly in favor of the tribal villages. Moreover, it found that the public interest, as expressed in the Conservation Act, favored granting the injunction. On the basis of these traditional equitable principles, it ordered the

district court to enter an injunction and once again remanded the case for a determination as to whether the lease sales should be voided.

The Secretary and the oil companies have now petitioned this Court for a writ of certiorari reviewing this decision as well as the decision in *Gambell I*. The petitions seek review of the conclusion, reached in *Gambell I*, that Title VIII applies outside the territorial waters of the State of Alaska. They further seek review of the *Gambell II* decision. Here the issues relate to the appropriateness of the lower court's balancing of the equities, the correctness of its construction of the Conservation Act, and its application of the Act to a lease sale which occurred after *Gambell I* was filed and submitted for decision but before the court's resulting opinion was published.

## REASONS FOR NOT GRANTING THE WRIT

### I

### *THIS CASE IS A TEMPEST IN A TEACUP*

The Secretary and the oil companies strongly suggest that this case presents important practical and legal issues. They allege that this case may seriously disrupt the nation's quest for energy independence and that, at the least, it involves leases whose value approaches four billion dollars. Further alleging that this mischief is created by the Conservation Act, the Secretary and the oil companies also suggest that any issues associated with that Act, no matter how trivial in the abstract, must likewise be so important as to warrant review by this Court.

These claims grossly exaggerate both the practical and legal implications of the case, creating a virtual tempest in a teacup. The supposed legal importance of the case is difficult to ascertain. The legal issues presented for decision are mundane and highly idiosyncratic. Possessing little relevance outside the narrow parameters actually presented for review, the legal issues cannot credibly produce the draconian consequences to which the petitioners allude. Nor does the case possess any practical importance. Exploration has proven that the actual lease tracts at issue contain no oil. For future leases, the substantive decision in the case merely requires Interior to comply with a fairly short and straightforward statute. That compliance effort does not pose a realistic threat to the nation's energy program or to its economic health.

This case certainly is of little immediate consequence, for the leased tracts at issue here hold out no promise of ever producing commercial quantities of oil and gas. Through adroit and facile legal maneuvering, the oil companies have completed exploratory drilling on the most promising of their tracts. That exploration has resulted in dry hole after dry hole — ample and convincing proof that the tracts likely contain no commercial quantities of oil and gas. Indeed, one irony of this case is that, in retrospect, the oil companies and the nation's economy would have undoubtedly been best served if the district court

had enjoined the lease sales. This would have at least prevented the oil companies from squandering resources exploring for oil on tracts where the probability of finding oil asymptotically approaches zero. A second irony is that, having obtained the information needed to reach that conclusion, the oil companies have every incentive to reverse their position one last time and claim that the sales should be voided — a remedy that would permit them to recover their misspent bid money.

This case similarly possesses little importance for future lease sales. The lower court held that Interior had to comply with a simple and short statute requiring that OCS leasing not unreasonably interfere with the subsistence fishing and hunting rights of Alaska's aboriginal people. This compliance effort will concededly change the contours of some OCS lease sales, for it requires the deletion of tracts which are important for subsistence but which hold a low potential for oil and gas. It will concededly delay OCS leasing in Alaska by requiring that Interior identify subsistence uses and needs before leasing occurs. In some extreme cases, it may prohibit unnecessary lease sales.

But these consequences are relatively insignificant. Leasing in a manner that minimizes the conflict between subsistence uses and oil and gas development is a sound idea. The Secretary should adopt it regardless of the existence of the Conservation Act. Moreover, delays attributable to adopting such a plan are of no great moment. The economic health of the country does not demand an expedited development of the Alaskan OCS. The cost of producing a barrel of oil in the Alaskan OCS ranges upwards of $40. The oil companies need approximately fifteen to twenty years to develop producing oil wells in that inhospitable and environmentally sensitive area. Current oil prices are hovering at $10-$15 per barrel; production of Alaskan OCS crude lies fifteen years in the future. The economic incentives for developing the Alaskan OCS are currently so low that within the last year Interior has twice canceled scheduled sales for lack of industry interest.[29] In this economic climate, expeditiously leasing the Alaskan OCS is certainly not a pressing national need.

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[29] The Anchorage Daily News, April 29, 1986 at B6.

Interior should encounter few problems when complying with the statute. The Conservation Act has applied to federal oil leases since 1980. Since that date, Interior has recognized that it controls disposal of the vast federal land holdings located on the Alaskan mainland. The agency has applied the statute to countless land disposals and offered countless leases for sale during this period. Not one disposal or lease has been prevented by the Conservation Act. Interestingly enough, the only Conservation Act challenge to a mainland lease sale was rejected by the same lower court which the Secretary would have this Court believe is unreasonably prejudiced against him. *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984).

Interior would best serve the public interest as well as all private interests by ending its pointless and unproductive judicial wrangling and by implementing a compliance program. Interior has proven that it can comply with the Conservation Act when it wishes. Yet it has chosen to take the low road in this case by refusing to comply with an inherently reasonable statute setting forth a sound management plan for the use of Alaska's natural resources. Its course has been folly. After three years of expensive and time-consuming litigation, no one is better off. The Secretary's OCS program in Alaska has been disrupted. The oil companies have been subjected to unnecessary delays and uncertainty. Alaskan Natives' subsistence needs have been virtually ignored. The better alternative is clear. The Secretary can promote all relevant interests by complying with the Conservation Act. Interior possesses the power to expeditiously lease the Alaskan OCS. It need only drop its recalcitrance and resolve to fairly and conscientiously address the subsistence needs of Alaskan Natives.

## II

## *THE PETITIONS ARE UNTIMELY TO THE EXTENT THEY SEEK REVIEW OF THE DECISION THAT THE CONSERVATION ACT APPLIES TO OCS LEASING*

The Secretary and the oil companies have requested review of *Gambell I's* determination that Title VIII of the Conservation Act applies to the OCS. In addition to raising an unimportant issue that has been settled for virtually two years, the petitions on this issue are untimely.

The rules governing timeliness are straightforward. Rule 20 provides that a petition for a writ of certiorari to review the judgment of a federal court of appeals shall be deemed in time "when it is filed with the Clerk within 60 days after the entry of such judgment." Sup. Ct. R. 20.1. That Rule further provides that "the time for filing a petition for a writ of certiorari runs from the date the judgment or decree to be reviewed is rendered, and not from the date of the issuance of the mandate." Sup. Ct. R. 20.4.

The judgment concerning the geographic scope of the Conservation Act was rendered on November 2, 1984. As noted by the petitioners, the court of appeals in *Gambell I* determined that Title VIII of the Conservation Act applied to the OCS on that date. This issue was not subsequently presented to the *Gambell II* court, and that court understandably did not pass on it.

The petitions on the issue of the geographic scope of the Conservation Act are therefore late. The only lower court judgment or decree dealing with whether the Conservation Act applies to the OCS was rendered on November 2, 1984. The time for seeking a writ of certiorari reviewing that decree ran on January 31, 1985. The decree cannot be reviewed by a petition filed in February of 1986.

This conclusion is supported by none other than the Solicitor General himself. After *Gambell I* was decided, the Solicitor requested of this Court an extension of time in which to file a petition for certiorari reviewing the judgment that Title VIII of the Conservation Act applied to the OCS. That request, reproduced below, concedes that the time for reviewing the *Gambell I* decision ran on March 2, 1985. It states:

The Solicitor General, on behalf of the Secretary of the Interior and the Department of the Interior, respectfully requests an extension of time, to and including March 2, 1985, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case. The judgment of the court of appeals was entered on November 2, 1984. A copy of the court's opinion is attached hereto. Unless extended, the time for filing a petition for a writ of certiorari will expire on January 31, 1985. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, establishes procedural requirements to be followed by federal land managers in order to harvest fish and wildlife. These requirements apply only to "land situated in Alaska," "title to which is in the United States" (16 U.S.C. 3102 and 3120). The question presented by this case is whether the seabed and subsoil of the Outer Continental Shelf fall within this definitional limitation, in light of the fact that the Outer Continental Shelf is outside the boundaries of the State of Alaska and the United States claims only sovereign rights to explore and exploit the resources of the Outer Continental Shelf but not ownership. The court of appeals held, inter alia, that ANILCA's procedural protections for subsistence activities do apply to Outer Continental Shelf lands and water contiguous to the State of Alaska. The decision of the court of appeals may be read to create a conflict between ANILCA and the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* The decision may also inject new legal requirements and procedures into existing statutory schemes for managing ocean resources in a manner not intended by Congress.

*Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit,* January 18, 1985.

This Court granted the Solicitor's request for an extension of time in which to seek review of the decision that the Conserva-

tion Act applies to OCS leasing. Electing not to seek review of the decision, the Solicitor permitted the deadline for the certiorari petition to pass. Interior then acquiesced in the decision by conceding that it was the correct rule of law on remand. Following *Gambell I,* the Secretary did not controvert the judgment that the Conservation Act applied to OCS leasing, either in the district court or the court of appeals. The oil companies similarly did not argue that *Gambell I* was wrongfully decided in either court.[30]

The Secretary's and the oil companies' failure to relitigate whether the Conservation Act applies to OCS leasing precludes their now petitioning for a writ of certiorari on that issue. Central to the relationship between higher and lower courts is the precept that, with limited exceptions, a higher court will not review an issue not presented to the inferior tribunal by the losing party.[31] The precept applies in this Court. An unbroken string of decisions previously issued by this Court holds that "[w]hen the issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 146 n.2 (1970). *Accord, e.g., Youngberg v. Romero,* 457 U.S. 307, 316 n.19 (1982); *Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958); *Husty v. United States,* 282 U.S. 694 (1931); *Duignan v. United States,* 274 U.S. 195 (1927).

The corollary to this rule is that a party losing an appeal must preserve the issue on remand in order to later petition for certiorari. The mechanics of the process are straightforward.

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[30] The oil companies' brief to the *Gambell II* court did indicate, by means of a one sentence footnote, that they "reserved" the argument that the Conservation Act did not apply to the OCS. An otiose reference at best, the footnote constitutes not the affirmative presentation of the issue contemplated by the Federal Rules. *E.g., Chicago & Western Indiana R.R. Co. v. Motorship Buko Maru,* 505 F.2d 579, 581 (7th Cir. 1974).

[31] The relationship dictates that the higher court will, however, affirm on any grounds, including those not relied upon or even considered by the lower court. *E.g., Hankerson v. North Carolina,* 432 U.S. 233, 240 n.6 (1977); *Massachusetts Mutual Life Ins. Co. v. Ludwig,* 426 U.S. 479, 480-81 (1976); *Dandridge v. Williams,* 397 U.S. 471, 475-76 n.6 (1970); *Langnes v. Green,* 282 U.S. 531, 535-39 (1931).

Following the remand, the issue must be re-presented to the trial court and, where an appeal is possible, re-presented to the appellate court. Only after perfecting the appeal in this manner may the party petition for certiorari. The two cases cited by the Solicitor — *Reece v. Georgia*, 350 U.S. 85 (1955) and *Falk v. Brennan*, 414 U.S. 190 (1973) — establish precisely this point. Those decisions hold that petitioning parties must preserve their rights after the remand by relitigating the lost issue in the trial court and, when appropriate, in the court of appeals. *See also Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488 n.6 (1968); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916).

The petitions with respect to whether the Conservation Act applies to the OCS are untimely. *Gambell I*, decided more than two years ago, held that the Act applied to the OCS. The time for petitioning for a writ of certiorari reviewing that decision ran over a year ago. Neither the Secretary nor the oil companies relitigated that issue in either the district court on remand or in the court of appeals in *Gambell II*. Having failed to present the issue to the *Gambell II* court, they cannot request that this Court review an issue decided two years ago and not preserved after the remand.

## III

### *THE PETITIONERS CANNOT COMPLAIN ABOUT AN INJUNCTION WHICH ISSUED AT THEIR REQUEST*

The Secretary and the oil companies have also petitioned for a writ of certiorari reviewing the court of appeals' determination that exploratory and developmental activities on tracts leased in violation of the Conservation Act should be enjoined. Review of this issue should be denied because the lower court issued the injunction at the Secretary's and the oil companies' behest.

The facts establish that the petitioners requested the injunction ordered by the *Gambell II* court. During the appeal of *Gambell I,* the tribal villages requested that the court of appeals void the Norton Sound lease sale. They contended that the Secretary had failed to comply with the statutory prescription of the Conservation Act before the sale and that, in light of the pertinent statutory language, he could not comply afterwards. The Secretary and the oil companies vigorously disagreed. To protect the lease sale, they requested that the court enjoin exploration and development rather than void the sale if it concluded that the Conservation Act applied to OCS leasing. 774 F.2d at 1417.

The *Gambell I* court declined to rule on this issue. Expressing the opinion that the issue involved significant legal as well as factual issues, it remanded the case to the district court for a decision as to whether the sale should be voided or whether exploratory and developmental activity should be enjoined. The remand order clearly circumscribed the district court's available choices. Under the order, the district court could either: (1) void the sale; or (2) enjoin all exploration and development until such time as the Secretary complied with the statute. *See* 746 F.2d at 582-83.

The *Gambell II* court relied heavily on this aspect of *Gambell I* when it reversed the district court's denial of a preliminary injunction. Quoting extensively from both the Secretary's and the oil companies' briefs in *Gambell I,* the *Gambell II* court judged that the Secretary and the oil companies had previously requested the injunction. 774 F.2d at 1417. It further judged that they could not abandon that position following the *Gambell I*

remand order merely because it was in their interest to do so. On this basis, the lower court determined that a preliminary injunction should issue until the district court either permanently enjoined exploration and development or voided the sale.

The record indicates that the lower court's decision to enjoin exploratory and developmental activity was dictated by the litigation position adopted by the Secretary and the oil companies. To a large extent the petitions submitted by the Secretary and the oil companies present a false portrait of the issue put to the *Gambell II* court. Implicit in their petitions is the suggestion that the court of appeals had placed before it a choice of enjoining exploration and development or not enjoining these activities. This is inaccurate. The choice presented to the lower court was between voiding the sales or enjoining exploration and development. The tribal villages asserted that the statutory language of the Conservation Act demanded that the court void the challenged sales. The Secretary and the oil companies argued that enjoining exploration and development was the appropriate remedy.

Because the Secretary and the oil companies requested that the court of appeals issue a permanent injunction, they have no ground for petitioning for review of its decision to issue a preliminary one. The Secretary and the oil companies requested that the court of appeals permanently enjoin exploration and development rather than void the sale. Pursuant to their request, that court ordered the district court to seriously consider whether they were entitled to have exploratory and developmental activities enjoined or whether the sale should be summarily voided. Having persuaded the lower court to at least consider their request for a permanent injunction enjoining exploration and development, the Secretary and the oil companies can hardly be heard to complain that the court entered a preliminary injunction enabling them to make their case on why the sale should not be voided. Surely the court of appeals is entitled to more gratitude than this.

## IV

## *THE COURT OF APPEALS DID NOT APPLY A PER SE INJUNCTION RULE*

The Secretary and the oil companies' petitions for a writ of certiorari reviewing the court of appeals' application of a *per se* injunction rule should be denied for an additional reason: namely, that the court of appeals did not apply such a rule.

The lower court's opinion details the standards the court applied when it evaluated the tribal villages' claim for preliminary injunctive relief. Contrary to the Secretary's and the oil companies' assertions, it irrefragably provides that the lower court used a traditional test which considered the probability of success on the merits, the balance of the equities, and the public interest. The opinion states:

> A. *Applicability of the Traditional Test*
>
> This court has recognized two sets of standards for evaluating a claim for injunctive relief. We refer to one as the "traditional" test and the other as the "alternative" test. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983). In *American Motorcyclist Ass'n* we described the traditional test as follows: "The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?" *Id.* at 965.
>
> "The 'alternative' test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious question are raised and the balance of hardships tips sharply in its favor." *Id. (citing Benda v. Grand Lodge of IAM,* 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975)).

> We have concluded, however, that the traditional and the alternative tests are "not really two entirely separate tests, but that they are merely extremes of a single continuum." *Benda v. Grand Lodge of IAM,* 584 F.2d at 315. *Accord, Regents of University of California v. ABC,* 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We have also noted that "[t]he difference between the two formulations is insignificant. Therefore, we accept either as satisfactory." *Benda,* 584 F.2d at 315. Because the district court employed only the traditional test, we will review the findings under that formulation. *See Regents of University of California v. ABC,* 747 F.2d at 515-16 n.4 (where the district court made a finding that the public interest favored the issuance of the preliminary injunction, this court reviewed the district court's findings under the traditional standard).

774 F.2d 1414, 1419 (9th Cir. 1985).

The decision to issue the injunction flowed naturally from the application of this traditional test. The court of appeals first determined, presumably to no one's surprise, that Interior had failed to comply with a statute that it had consciously refused to apply to OCS leasing. It then proceeded to the balance of equities. Here it found that the Secretary's violations of the Conservation Act constituted irreparable harm. *See id.* at 1422-1425. It also found that the "by-products of oil and gas exploration such as potential oil spills, leakage, and noise" threatened to disrupt subsistence hunting and fishing to the extent that it could "destroy irreparably the isolated and unique culture of the Native Alaskans." *Id.* at 1426. Since neither Interior nor the oil companies offered any evidence indicating that they would suffer irreparable harm if the injunction issued, the court concluded that the balance of the equities tipped sharply in favor of the tribal villages. The court then ended its inquiry by considering the public interest. On this issue, the court judged that the best expression of the public interest was contained in the Congressional prohibition against leasing in a manner that unreasonably restricted subsistence uses. It further judged that

the public interest would be best served by requiring that the Secretary follow the controlling statutory requirements. *See id.* at 1425-26.

This decision simply does not support a petition to review an ostensible application of a *per se* injunction rule. The only aspect of the opinion which might conceivably be *per se* is the conclusion that violations of statutory prohibitions are judicially cognizable harms which must be considered in determining whether injunctive relief is appropriate in a given case. This long-standing presumption is the governing rule in this Court as well as in every circuit court of appeals. *E.g., Weinberger v. Romero-Barcelo,* 456 U.S. 305, 315 (1982); *TVA v. Hill,* 437 U.S. 153, 193-96 (1978); *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975); *United States v. City and County of San Francisco,* 310 U.S. 16, 30-31 (1940); *Foundation On Economic Trends v. Heckler,* 756 F.2d 143, 157 (D.C. Cir. 1985); *Alaska v. Andrus,* 580 F.2d 465, 485 (D.C. Cir.), *vacated in part as moot sub nom. Western Oil and Gas Association v. Alaska,* 439 U.S. 922 (1978); *Massachusetts v. Watt,* 716 F.2d 946, 952-53 (1st Cir. 1983); *Sierra Club v. United States Army Corps of Engineers,* 701 F.2d 1011, 1034-35 (2d Cir. 1983); *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 443 (5th Cir. 1985); *United States v. City of Painesville,* 644 F.2d 1186, 1193-94 (6th Cir. 1981); *Wisconsin v. Weinberger,* 745 F.2d 412, 425-28 (7th Cir. 1984). *See* Plater, *Statutory Violations and Equitable Discretion,* 70 Cal.L.Rev. 524 (1982). It cannot realistically be viewed as presenting a substantial issue needing reaffirmation on yet one more occasion.

The petitioners' real quarrel is with their failure to make a record demonstrating they would suffer irreparable harm if the injunction issued. Their complete and absolute inability to construct such a record is remarkable. Certainly the Secretary never claimed he would suffer any harm. In both the district court and the court of appeals he stood silent, tacitly conceding that the government would not suffer any harm should the injunction issue. 774 F.2d at 1424-25. Nor did the oil companies do much more. For their part, they argued that they would be harmed by financial losses that would accrue from disrupted contracts signed after *Gambell I* was decided. Properly ignoring this harm,

the court of appeals applied the invariant rule that a party cannot alter the balance of hardships by bootstrapping itself into a position of harm.

In summary, the record in this case does not reveal that the lower court applied a *per se* injunction rule. Precise and explicit, it unquestionably demonstrates that the injunction issued because the petitioners failed to show any irreparable harm associated with the issuance of an injunction. The lower court's decision to issue the injunction was not — as the Secretary and the oil companies claim — a function of the application of a *per se* rule. It was merely the normal and expected result which obtains from balancing the equities when one side puts nothing on the scales for the weighing.

## V

## *THE LOWER COURT'S DECISION THAT THE CONSERVATION ACT APPLIES AT THE LEASING STAGE DOES NOT PRESENT A SERIOUS LEGAL QUESTION*

Both the Secretary and the oil companies have requested that this court review the Ninth Circuit's decision holding that the Conservation Act applies at the leasing stage. Relying on *Secretary of the Interior v. California,* 464 U.S. 312 (1984), they allege that the Conservation Act should be construed to apply only to exploration and development. Pushing the analogy between different statutes beyond all reason, they further allege that the lower court's decision in this case conflicts with this Court's decision in that one.

The argument that this case conflicts with *Secretary of the Interior v. California* is specious. The issues presented by the two cases are not remotely similar. *Secretary of the Interior* resolved the timing question of when the Coastal Zone Management Act applied to OCS leasing. That statute requires a consistency determination whenever an administrative action "directly affects" the coastal zone. This Court held that the phrase "directly affects" contemplates an action which results in an immediate and actual physical effect on the coastal zone. Since leasing does not technically effect such an impact, this Court found that the requirements of the CZMA were not triggered by activities associated with that leasing. This case presents no similar timing question. Section 810 of the Conservation Act dictates that compliance must precede leasing. Its terms mandate that the Secretary perform certain studies, initiate certain procedures, and make certain findings. Its terms further mandate that these actions must occur before he decides to lease or before he issues leases. Resolved by the plain language of the statute, the timing question of when the Conservation Act applies to OCS is simply not an issue.

In this regard, the conclusion that the Conservation Act applies at the leasing stage cannot be credibly controverted. The plain language of the statute provides that in the time/space

continuum in which leasing occurs, compliance with the statutory mandates of the Conservation Act must be accomplished before leasing decisions are made, or, in the most extreme case, before any lease issues. It requires the Secretary to complete and then consider extensive studies "*[i]n determining to lease* public lands under any provision of law authorizing such actions." 16 U.S.C. § 3120 (emphasis added). Flatly prohibiting some types of leasing, it further provides that "*[n]o lease* of such lands which would significantly restrict subsistence uses shall be effected" unless and until the Secretary undertakes the procedures and makes the findings specified by section 810(a)(1)-(3). *Id.*

The statutory language resolves all questions relating to the timing of a Conservation Act compliance effort. Embodying specific and direct commands, the statute requires that effort before leasing occurs. And, as the courts of appeals have unanimously held, a compliance effort at the leasing stage must consider the effects attributable to leasing as well as all other actions flowing naturally from that leasing. *See, e.g., North Slope Borough v. Andrus,* 642 F.2d 589 (D.C. Cir. 1980); *Massachusetts v. Watt,* 716 F.2d 946 (1st Cir. 1983); *Conservation Law Foundation v. Andrus,* 623 F.2d 712 (1st Cir. 1979); *Massachusetts v. Andrus,* 594 F.2d 872 (1st Cir. 1979); *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978); *Sierra Club v. Morton,* 510 F.2d 813 (5th Cir. 1975); *Village of False Pass v. Clark,* 733 F.2d 605 (9th Cir. 1984).

From a broader perspective, the question presented by this case is whether any compliance effort is required at the lease stage. It is not whether a specified compliance effort is sufficient to meet stringent statutory requirements unreasonably established by the court of appeals. In their petitions, the Secretary and the oil companies suggest that Interior made at least a feeble attempt to comply with the Conservation Act before holding the lease sales at issue. This suggestion is false. Prior to these sales, the Secretary consciously refused to comply with the Conservation Act. After concluding that the Act did not apply to OCS leasing, he ignored its statutory directives. In light of the statutory language which states that compliance must occur

"*[i]n determining to lease,*" Interior's claim that it did not have to comply with the Act before issuing leases hardly presents a dignified and legitimate legal issue — much less one important enough to warrant the attention of this Court.

## VI

## *THIS CASE DOES NOT INVOLVE A RETROACTIVE APPLICATION OF THE CONSERVATION ACT*

Finally, the Secretary as well as the oil companies have petitioned this Court for review of what they claim is a retroactive application of the Conservation Act to sales which were held after Congress enacted that statute but before the court of appeals decided *Gambell I*. They allege the decision to apply the Conservation Act to those sales would violate this Court's opinion in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The record unequivocally demonstrates that this question is not presented by this case. The operative, controlling, and uncontroverted facts are set out by the lower court's opinion. They are as follows. Congress passed the Conservation Act in December of 1980. *Gambell I* was filed on March 4, 1983, about two years later. It was submitted to the court of appeals following oral argument on October 7, 1983. While the case was submitted, the Secretary determined to hold another lease sale. He did so "with knowledge that his right to do so without complying with the Conservation Act was in doubt." 774 F.2d at 1427. The oil companies that were parties to *Gambell I* bid on the leases offered at this sale. They placed their bids "with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending." *Id.*

These facts do not support the claim that the lower court applied a novel interpretation of the Conservation Act to lease sales held before the Secretary had notice that his interpretation of the Conservation Act would be challenged. This case involves only two lease sales. One was subjected to a Conservation Act challenge before it was held. The other was held after *Gambell I* was submitted — at a time when both the Secretary and the oil companies had constructive as well as actual notice of the potential problems associated with holding an OCS lease sale in Alaska without complying with that Act. Since the two sales at issue here were held after all parties had notice of the Conservation Act challenge, this case does not involve the issue of whether the

Conservation Act should be applied retroactively.[32] Rather than embodying a retroactive application of a new and unexpected statutory interpretation, the lower court's decision merely illustrates the established rule that a litigated case acts as a *lis pendens,* placing on notice all bidders at sales held subsequent to its filing. *E.g., Conservation Law Foundation v. Andrus,* 623 F.2d 712, 720 (1st Cir. 1979); *North Slope Borough v. Andrus,* 486 F. Supp. 326, 331 (D. D.C. 1979).

## CONCLUSION

The petitions for certiorari should not be honored. This case has little practical importance in the current economic climate. The legal issues upon which review has been requested are untimely, unimportant, and not presented by the record and facts of this case.

Respectfully submitted,

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[32] No case has raised a Conservation Act challenge to an OCS sale held before *Gambell I* was filed.

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No. 85-1239

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY BRIEF OF PETITIONERS AMOCO PRODUCTION COMPANY, *ET AL.*

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## REPLY BRIEF OF PETITIONERS AMOCO PRODUCTION COMPANY, *ET AL.*

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### I.

A. In their efforts to obscure the Ninth Circuit's refusal in *Village of Gambell* v. *Hodel*, 774 F.2d 1414 (1985) (*Gambell II*) (Petn. A23), to follow the teachings of this Court in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), respondents contend that the preliminary injunction commanded by the Ninth Circuit was in fact "requested" by petitioners. (Opp. 18). In support of this assertion, respondents cite a passage from *Gambell II*, 774 F.2d at 1417 (Petn. A25), quoting from the industry-defendants' brief in *Village of Gambell* v. *Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*). However, as recognized in *Gambell*

II, the industry defendants represented to the court in *Gambell II* that an injunction pending compliance with ANILCA would be appropriate only " 'if irreparable harm is shown,' " specifically citing *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305. *See* 774 F.2d at 1417 (Petn. A25).

Since petitioners explicitly preserved the position in *Gambell I* that respondents must show irreparable harm to obtain an injunction, respondents' argument that we requested an injunction in *Gambell II* is obviously wrong.

B. As a further effort to avoid the *Weinberger* issue, respondents argue that the Ninth Circuit did not rely on a *per se* injunction rule in *Gambell II*. This contention asks this Court to ignore what the Ninth Circuit did, as well as what it said.[1]

On remand from *Gambell I*, the district court in this case followed the approach directed by *Weinberger*. After reviewing the environmental impact statement prepared in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), analyses prepared under the Endangered Species Act (ESA), 16 U.S.C. § 1536(b)(3)(A), and the OCS Lands Act (OCSLA), 43 U.S.C. § 1331, and an explicit ANILCA evaluation for Sale No. 57 prepared in the aftermath of the Ninth Circuit's ruling in *Gambell I*, which concluded that neither Sale No. 57 leasing nor exploration would cause significant subsistence restrictions, the court decided that exploration in the Sale No. 57 region should not be preliminarily enjoined because "exploration will not significantly restrict subsist-

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[1] Respondents quote at length from a portion of *Gambell II* which sets forth the "traditional test" for injunctive relief (Opp. 20). As is clear from the later portions of its opinion (A36-42), however, the court of appeals undertook no balancing of relative hardships to the parties, finding the district court's balancing to be "an error of law." (A42). Indeed, the Ninth Circuit believed *Weinberger's* command that courts must balance hardships applicable only to cases brought under the Clean Water Act. (A42 n.2).

ence resources." (Petn. A62-A63).[2] It found further that there was ample opportunity to protect subsistence prior to the production stage when adverse impacts might occur and that an injunction would interfere with ongoing exploration. (A63).[3]

The *Gambell II* court reversed, stating that "the Ninth Circuit rule [is] that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances" (A38)—*i.e.*, that the injunction would harm the environment or interfere with the performance of long-term contracts. (A40). Accordingly, the Ninth Circuit by both its words and its actions made clear that it reversed the district court's denial of an injunction precisely *because* that court had balanced the equities as required by *Weinberger*.

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[2] The consideration given to subsistence issues by virtue of Interior's compliance with NEPA and other environmental statutes, as well as its post-sale ANILCA evaluation for Sale No. 57, belies respondents' argument that their subsistence needs have been "virtually ignored." (Opp. 14).

[3] Respondents make the remarkable claim that the district court denied the injunction which they requested "without explaining or elucidating its reasoning or rationale, and without expressly balancing the equities. . . ." (Opp. 12). In doing so, they simply ignore the district court's explicit findings that exploration would not harm them.

They also assert that "neither Interior nor the oil companies offered any evidence indicating they would suffer irreparable harm if the injunction issued. . . ." (Opp. 20). Again, they ignore the record, as accurately summarized by the dissenting judge below:

> "[A]ppellees presented evidence which showed that they would have suffered irreparable harm if a preliminary injunction had been issued. At the time the district court was deciding whether to enter a preliminary injunction, Exxon, Amoco, and ARCO had committed almost $70 million in support of their plans to explore Lease Tracts Nos. 57 and 83 during the summer of 1985. If the trial court had enjoined their exploration activities, their money would have been lost. The permanent lost of $70 million constitutes substantial irreparable harm." 774 F.2d at 1430 (Petn. A51).

## II.

A. Respondents' characterization of the issue of ANILCA's application to the OCS as "a tempest in a teacup" is ludicrous. Two OCS lease sales, involving bonus bids of more than $800 million and exploration expenditures of over $100 million, have been indefinitely enjoined because of purported violations of ANILCA.[4]

Moreover, the Ninth Circuit has recently affirmed, solely on the basis of *Gambell II*, still another injunction against an OCS Sale. *See Village of Akutan* v. *Hodel*, Nos. 86-3512, *et al.* (9th Cir., filed April 28, 1986) (reprinted in the Appendix hereto), holding that any prospect of significant subsistence restrictions during an OCS project, even if unlikely and even if associated only with the final production stage of the project, requires immediate leasing-stage compliance with ANILCA's requirements for notice, hearings and findings.[5]

Respondents are thus forced to recognize that compliance with ANILCA "will concededly change the contours of some OCS lease sales. . ., delay OCS leasing in Alaska. . . . [and] may prohibit some unnecessary lease

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[4] Respondents, without any record support, contend that further exploration in the Sale Nos. 57 and 83 areas is unimportant because initial exploration has been unsuccessful. Even were they correct in making this assertion, an initial season of unsuccessful exploration would not support the conclusion that the companies are not interested in conducting further exploration in those areas.

[5] In depreciating the significance of the ANILCA issue tendered by petitioners, respondents argue that the statute is "fairly short and straight-forward" (Opp. 13) and contend that "Interior has proven that it can comply with [ANILCA] when it wishes" (Opp. 14). This argument ignores the *Akutan* case, where the Department did prepare, prior to a lease sale, a complete ANILCA evaluation, which concluded that leasing, exploration, and production/development were all "unlikely" to cause significant restrictions of subsistence.

sales." (Opp. 13). Respondents' attempt to dismiss these consequences as "relatively insignificant" (Opp. 14) ignores the congressional purpose in the OCSLA "to 'promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf. . . .' " *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981) (citations omitted).

B. Respondents argue that petitioners cannot obtain review of the Ninth Circuit's conclusion in *Gambell I* that ANILCA applies to OCS leasing because they did not relitigate that issue in *Gambell II*.

As respondents reluctantly acknowledge (Opp. 16 n.30), however, industry-petitioners specifically reserved the argument in *Gambell II* that *Gambell I* was wrongly decided. Such a reservation of their position on the issue represented a sensible way to remind the Ninth Circuit of petitioners' continuing disagreement with *Gambell I* without wasting both the parties' and the court's efforts in a futile effort to reargue the issues decided in *Gambell I*.

That such an effort would have been futile flows from the Ninth Circuit's view of the "law of the case" doctrine:

> "The 'law of the case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case." *Moore* v. *Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982) (citations omitted).

*See also Kimball* v. *Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979).

The "law of the case" doctrine does not, however, bar later litigation of the issue at a higher appellate level. *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); 18 Wright, Miller, *et al.*, Federal Practice and Procedure § 4478, p. 801 (1981).[6] Moreover, the law is clear that

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[6] None of the decisions cited by Respondents (Opp. 17) establish the

defendants were not obliged to seek certiorari from the interlocutory decision in Gambell I, but instead could raise the ANILCA issue decided there following the further definition in *Gambell II* of the contours of the ANILCA obligation as it applies to the OCS. *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964). *See generally* Amoco Production Co., *et al.*, Opposition to Cross-Petition in No. 85-1608, at pp. 8-9.

C. Respondents' "Statement of the Case" serves as their argument that ANILCA should apply to OCS leasing.

First, respondents contend that ANILCA's protection of subsistence represents a final "settlement" of the hunting and fishing rights which were extinguished by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (ANCSA). (Opp. 2). However, respondents themselves concede that, in extinguishing hunting and fishing rights, ANCSA itself afforded Native Americans

> "three major forms of compensation: Monetary settlement, rights to future payments from oil and gas and mineral leases and 40 million acres of unallocated federal lands." (Opp. 6).

The monetary payment received by Native Americans under ANCSA was nearly $1 billion, 43 U.S.C. § 1605(a), (c),

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proposition that a party who loses an issue on an initial appeal to a court of appeals must continue to relitigate that issue before it can seek review of that issue in the Supreme Court. The "unbroken string of decisions" (Opp. 17) referred to by respondents establishes only that petitioner must have litigated the issues in its petition in the court of appeals at some point before seeking review in this Court. For example, in *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973), the Court denied certiorari when the petitioners first sought review, but granted certiorari after the court of appeals affirmed entry of judgment. There is no indication in the Court's opinion that the petitioners relitigated the issues previously decided against them on their first appeal.

and even respondents characterize the ANCSA settlement as "generous." (Opp. 7).

ANILCA was not, therefore, designed to be a *quid pro quo* for the title extinguishment of ANCSA and was not designed to follow the contours of the earlier Act. Indeed, while ANCSA extinguished only Native claims, ANILCA was carefully drafted to extend its benefits to all persons, Native and non-Native. (Petn. 19-20).[7]

Respondents' second claim is that "the Eskimo treat the ice as a mere extension of land" upon which they build roads, set up camps and hunt and fish (Opp. 2), so that ANILCA cannot sensibly be limited to lands that lie within the State of Alaska, but instead must also apply to the OCS. However, as we demonstrated in our petition (pp. 16-17), Section 810 of ANILCA applies only to "public lands" in Alaska, 16 U.S.C. § 3120(a), which are in turn defined as "lands, the title to which is in the United States. . .," 16 U.S.C. § 3102(2). As we also demonstrated in our petition, the United States does not assert "title" to any part of the OCS.[8]

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[7] Respondents allege, without citation, that before the *Gambell I* suit was filed the oil companies contended in *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ___U.S. ___, 106 S.Ct. 68 (1985), that "it was 'clear and unambiguous' that the phrase 'in Alaska' referred to a geographic area lying between the high tide mark and the two hundred mile limit." The allegation is false. In *Inupiat Community*, the oil companies argued in the district court, *inter alia*, that Section 4(b) of ANCSA extinguished aboriginal title (if any existed, which was denied) to the OCS, *despite* the use of the phrase "in Alaska," because the legislative history demonstrated congressional intent to settle all aboriginal claims of Alaskan Natives. Memorandum in Support of Motion of Defendants Amoco Production Co., *et al.*, for Judgment on the Pleadings, pp. 106-14. In the Ninth Circuit, the oil companies' only ANCSA argument was that Section 4(c), which extinguished "claims . . . that are based on [aboriginal claims] in Alaska," extinguished claims outside as well as inside Alaska, because the former were based on the latter. Brief of Appellees Amoco Production Co., in *Inupiat Community, et al.*, pp. 43-46.

[8] Congressional recognition of this principle has come to our attention

Respondents' claim that OCS ice and waters are mere extensions of Alaska's land does not even attempt to come to grips with this argument. While Native Alaskans doubtless do conduct subsistence activities on the high seas and on the ice during winter, it is quite clear that the United States does not assert title to these areas. Since ANILCA is limited to protecting subsistence "on the public lands," 16 U.S.C. §§ 3111(1)-(5); 3120, it clearly does not extend to activities on the OCS.

D. Respondents miss the point of our argument that, if ANILCA applies to the OCS, the Ninth Circuit improperly ignored the distinct stages of the OCS leasing process. Their observation that *Secretary of the Interior v. California*, 464 U.S. 312 (1984), did not interpret ANILCA is irrelevant. *Secretary of the Interior* establishes that the four-stage process of OCS leasing and development incorporated into OCSLA must be considered when applying any statute to the early stages of OCS leasing. *See id.* at 341.

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since the filing of our petition. In H.R. Rep. No. 99-300, 99th Cong., 1st Sess., p. 591 (Oct. 3, 1985), the House Merchant Marine and Fisheries Committee discussed the term "public lands" as it has "enjoy[ed] two centuries of well-established meaning [and] has been used by the Congress and interpreted by the Supreme Court." The Committee recognized that "[t]wo fundamental criteria determine whether or not a land area constitutes public lands; the holding of title to the area and the ability to sell or otherwise dispose of it." *Id.* The Committee concluded, for exactly the same reasons recited in our petition, that

> " '[t]he U.S. does not hold title to the OCS, nor is the OCS subject to 'sale or other disposition under general laws.' As opposed to full dominion and control, the U.S. has claimed only limited sovereignty over the exploration and development of natural resources on and within the OCS. The U.S. in no way exercises title to or sovereignty over the area itself. Except for the resources-related claims of jurisdiction over the fisheries and mineral deposits of the OCS, the area is international and beyond U.S. control, as recently reiterated by the President's Exclusive Economic Zone Proclamation." *Id.* at 591-92.

E. Respondents argue that the mere filing of their complaint established a *lis pendens*, thus justifying a retroactive application of the Ninth Circuit's holding that ANILCA applies to the OCS. This argument is inconsistent with the decisions cited in the Petition (Petn. 25 n.26), in which this Court expressly refused to apply novel constructions of particular statutes back to the dates when the complaints asserting those theories were initially filed.[9]

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[9] For example, in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), plaintiffs brought their claim in 1972 alleging that defendants were illegally deducting larger pension contributions from the paychecks of female than from those of male employees. The lower courts agreed, and enjoined the practice in 1975. Although agreeing that the withholding practice was unlawful, the Court held that the lower courts erred in ordering refunds of excess contributions for the years 1973 through 1975, even though the contributions were made after the complaint was filed

## CONCLUSION

For the reasons recited above and in the petition, this Court should grant a writ of certiorari and set this case for plenary argument.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**Nos. 86-3512/86-3514/86-3517**

**DC Nos. CV-A85-701-V**
**CV-J85-037-V**
**CV-J85-038-V**

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TRIBAL VILLAGE OF AKUTAN, *et al.*,
*Plaintiffs-Appellees,*

vs.

DONALD P. HODEL, *et al.*,
*Defendants-Appellants.*

---

**Appeal from the United States District Court**
**for the District of Alaska**
**James A. von der Heydt, District Judge, Presiding**

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**MEMORANDUM***

Argued and Submitted March 14, 1986

Before: DUNIWAY, GOODWIN, BRUNETTI, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

In this consolidated appeal, appellants Secretary of the Interior, ten oil cbmpanies, and others, seek review of a district court order granting a preliminary injunction restraining the Secretary from proceeding with Lease Sale 92 in the North Aleutian Basin. We affirm.

## I. BACKGROUND

Lease Sale 92 is proposed as part of the Department of Interior's current five-year offshore oil and gas leasing program, established under section 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344. In preparing for the Sale, the Secretary was required to conduct an evaluation of the effects of the sale on subsistence uses and resources pursuant to section 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 1320(a). Section 810(a) can be described as consisting of two tiers, the first requiring an evaluation, and the second, under the appropriate circumstances, requiring notice, hearings, and minimization of adverse impact upon subsistence uses and resources.

The Secretary conducted an evaluation pursuant to the first tier of section 810(a), but, based on his finding that significant subsistence restrictions were "unlikely," declined to undertake the second tier procedures of noticed hearings and mitigation of environmental harm.

Following the Secretary's announcement in December 1985, of his decision to go forward with Lease Sale 92, appellees the State of Alaska, Trustees for Alaska, the Tribal Village of Akutan, and others, filed suit in federal district court. The parties sought a preliminary injunction against the receipt and opening of bids based on violations of ANILCA and other statutes.[1]

---

[1] Appellants alleged violations of section 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345, section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), and sections 7 and 9 of the Endangered Species Act, 16 U.S.C. §§ 1536, 1538.

On January 13, 1986, the district court enjoined the Secretary from proceeding with the bidding process in Lease Sale 92. Invoking two recent Ninth Circuit decisions construing ANILCA, the court concluded that the Secretary had applied an incorrect legal standard in determining his duties under section 810(a) and accordingly had failed to comply with the notice and hearing requirements in section 810(a)(1)-(3). Specifically, the court held that, notwithstanding the Secretary's finding that subsistence restrictions were unlikely, where a proposed action "may significantly restrict subsistence uses," the Secretary is required to proceed with notice and hearing under the second tier of section 810(a). Memorandum and Order at 2-3, *citing People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414, 1421-22 (9th Cir. 1985), and *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cir. 1984). The district court concluded that appellants had established a strong likelihood of success on their ANILCA claim, and that an injunction was required as a matter of course under *Gambell II*, 774 F.2d at 1422-26. Having granted a preliminary injunction based on appellants' ANILCA claim, the court declined to address the other alleged statutory violations.

## II. STANDARD OF REVIEW

Our review of a ruling on a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court," *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982), and will be reversed only for an abuse of discretion or if the decision is based on an erroneous legal standard. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

"To obtain a preliminary injunction, a party must show either 1) a likelihood of success on the merits and the

possibility of irreparable injury, or 2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor." *Apple Computer,* 725 F.2d at 523. Absent unusual circumstances, irreparable damage is presumed and in injunction is required when an agency violates ANILCA section 810(a). *Gambell II,* 774 F.2d at 1422-23.

Because the preliminary injunction rested solely on the district court's interpretation of section 810(a), our review is, as a practical matter, *de novo.*

## III. DISCUSSION

The central issue before us can be simply framed: When do the notice and hearing requirements under ANILCA section 810(a) apply? Must the Secretary find that a proposed action "*would* significantly restrict subsistence uses?" 16 U.S.C. § 3120(a) (emphasis added). Or is a finding that significant restrictions "*may*" result sufficient, even though such restrictions are deemed unlikely?

The Secretary contends that a finding that a proposed action "would" significantly restrict subsistence uses is required to trigger section 810(a)(1)-(3) notice and hearing procedures. He offers the following arguments in support of his construction: 1) this court's decisions in *Kunaknana* and *Gambell II* do not require compliance with section 810(a)(1)-(3) absent a likelihood of significant restrictions upon subsistence resources, and 2) the Secretary's construction is required by the plain language of the statute and is entitled to judicial deference. We consider these arguments in turn.

### A. Kunaknana and Gambell II.

In *Kunaknana v. Clark,* 742 F.2d 1145 (9th Cir. 1984), we read section 810(a) as requiring notice and public hearings "if the agency first concludes that the contemplated action *may* significantly restrict subsistence uses." *Id.* at 1151 (emphasis added).

> The inference to be drawn from [the phrase "which would significantly restrict subsistence uses"] is that Congress intended a two-step process: first, the agency determines whether the contemplated action may significantly restrict subsistence use; if it may, the agency must comply with the notice and hearing procedures. This construction of the statute is a reasonable one, relying on the plain meaning of the words of the statute.

*Id.*

Although the *Kunaknana* court was not called upon specifically to decide when section 810(a)(1)-(3) procedures would be required, its analysis has subsequently formed the basis for a holding in this circuit.

In *People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414 (9th Cir. 1985), the Secretary's section 810(a) evaluation indicated that development and production of the proposed lease sale "may significantly restrict subsistence uses in certain areas." *Id.* at 1422. The court held that under *Kunaknana* the Secretary's finding required that he proceed with the notice and hearing procedures under section 810(a)(1)-(3). *Id.*

Moreover, the argument that the Secretary makes here was presented in nearly identical form to the *Gambell II* court:

> Interior has interpreted the language of Section 810 to require a likelihood of a significant restriction to be evident before the procedures of Subsections 810(a)(1)-(3) come into play. Thus, it found here that "given the low probability that oil will be found, these possible restrictions [at the production stage] are not likely to occur, even locally, as a result of the sale". . . . It also found that significant restrictions on subsistence at the exploration stage "are not likely* * *". . . .

Supp. ER, Vol. II, Ex. 10, CR 32.

The *Gambell II* court rejected the Secretary's view that section 810(a)(1)-(3) procedures required a *likelihood* of significant subsistence restrictions, and, on findings not meaningfully different than those here, concluded that the Secretary was required to comply with the notice and hearing requirements of the statute. We believe that *Gambell II* governs this case, and that the district court did not err in determining that appellants had shown a strong likelihood of success on the merits of their claim that the Secretary had failed to comply with the notice and hearing requirements of section 810(a)(1)-(3).

**B. Plain Language and Deference to Agency Interpretation**

The Secretary next urges that his interpretation of section 810(a)(1)-(3) is required by the plain language of the provision, and, as an agency's interpretation of a statute it is charged with administering, is entitled to a high degree of judicial deference and must be upheld unless unreasonable. Both these arguments might be compelling in the abstract, but because we consider *Gambell II* plainly controlling, they do not alter our conclusion that compliance with section 810(a)(1)-(3) procedures is required before the Secretary may proceed with Lease Sale 92. *See Cubanski, etc. v. Heckler*, No. 85-7123, slip op. at 7, (9th Cir. March 6, 1986) (courts are the final authorities on issues of statutory construction).

## CONCLUSION

The district court applied the correct legal standard in concluding that the Secretary must comply with the notice and hearing procedures in ANILCA section 810(a)(1)-(3) when he finds that significant restrictions on subsistence uses are "unlikely." Having identified a probable ANILCA violation, the court did not abuse its discretion in granting a preliminary injunction.

(3) (4)

Nos. 85-1239, 85-1406

Supreme Court, U.S.
FILED
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CLERK

In The

# Supreme Court of the United States

October Term, 1985

ARCO ALASKA, INC.; AMOCO PRODUCTION COMPANY; et al.,

*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL; et al.,

*Respondents.*

DONALD P. HODEL, Secretary of the Interior; and UNITED STATES DEPARTMENT OF THE INTERIOR,

*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL; et al.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

[redacted] **BRIEF OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC. AND THE ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS, SECRETARY OF THE INTERIOR, ET AL.**

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Nos. 85-1239, 85-1406

In The

# Supreme Court of the United States

October Term, 1985

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v.

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*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND THE ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS, SECRETARY OF THE INTERIOR, ET AL.

This motion of Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance (ASIA) to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. All parties have given their oral consent to this amicus

curiae brief. However, due to the insufficient time to physically procure the parties' individual written consents and still comply with the parties' intended briefing schedule, the applicants herein have not been able to lodge the parties' consents with the Clerk of the Court, and proceed instead by way of motion for leave to file the annexed amicus brief. As soon as the parties' written consents have been obtained, applicants, Resource Development Council for Alaska, Inc., and Alaska Support Industry Alliance, will lodge them with the Clerk of this Court.

Resource Development Council for Alaska, Inc., is a nonprofit corporation composed of some 10,000 members. Membership includes people in government, education, business (both management and labor), and many from various other segments of the private sector. RDC is dedicated to creating a broad-based, diversified, and stable economy for Alaska. It advocates developing Alaska's resources in an orderly manner, creating long-term, stable employment improving living standards, and reducing living costs for Alaskans. RDC supports reasonable and necessary environmental protection of Alaska's priceless fish, waterfowl, and marine mammal resources.

Alaska Support Industry Alliance is an association of some 200 employers doing business in Alaska. Membership provides equipment, supplies, and services to the state's oil, gas, and mining industries. The membership is extremely broad, representing engineering companies and constructors, architects, attorneys, oil well loggers,

and drilling firms. Also included are caterers, transportation companies, equipment vendors, and diving firms. ASIA has union and nonunion employers, with all sizes of employers represented. The unifying focus of ASIA is an awareness of the critical role of the state's oil and gas industry for the social and economic fabric of Alaska. ASIA fully supports reasonable environmental regulation of petroleum resource development activities.

The issues posed by the petitions for writ of certiorari in this case are of national significance, exceeding even the interests of parties from Alaska where this controversy originated. The proper role of federal courts in enforcing environmental statutes, the proper interpretation of those statutes, and the correct judicial construction of congressional intent in the enactment of such statutes are issues that reach beyond the confines of the State of Alaska. Nevertheless, amici are directly affected by such questions in a particularly direct manner. Their experience with the results of the statutory construction and interpretation that necessitate the petition in this case forms a unique public interest perspective that is well-suited to providing the Court with additional argument. Amici, Resource Development Council for Alaska, Inc., and the Alaska Support Industry Alliance, have concluded that, because of the national significance of these issues, the present parties cannot adequately represent the interest of the broader public while at the same time representing their own particularized positions.

For the foregoing reasons, Resource Development Council for Alaska, Inc., and the Alaska Support Industry Alliance request that this motion to file the annexed brief amicus curiae be granted.

DATED: March 4, 1986.

Respectfully submitted,

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Nos. 85-1239, 85-1406

In The
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS, SECRETARY OF THE INTERIOR, ET AL.

## INTEREST OF AMICI

As initially set out in Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance's (ASIA) preceding motion for leave to file this brief, RDC and ASIA are organizations which represent a broad spectrum of the public vitally interested in the fair and accurate interpretation of the environmental and conservation statutes that guide the exploration for and development of Alaska's vast offshore petroleum energy resources. RDC and ASIA represent individuals and organizations, both private and governmental, whose economic survival will be, and is now being, severely and negatively impacted by erroneous legal rules and statutory constructions emanating from the United States Court of Appeals for the Ninth Circuit's decision in this and related cases.

The Ninth Circuit's announced rule of a *per se* requirement of injunctive relief upon a *prima facie* showing of violation of an environmental or conservation statute has operated to unreasonably restrict the opportunities of RDC and ASIA's members to pursue their livelihoods and count upon stable sources of income. By unnecessarily shutting down the enormously expensive process of outer continental shelf (OCS) development and rendering that process even more uncertain, this unprecedented departure from traditional equity principles has cost untold amounts in lost employment and economic opportunity for Alaskans and other Americans.

The Ninth Circuit's construction of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, has the capacity for producing the same negative effects on the Alaska and national economies. By requiring the Secretary of the Interior to

attempt to evaluate effects of OCS exploration and development or production at a time in the leasing process when such effects are uncertain and speculative at best, the Ninth Circuit's decision in this case casts a completely unnecessary cloud on the legitimate pursuit of environmentally sensitive OCS development activities. The result is the unwarranted waste of time and pointless duplication of regulatory processes.

Finally, the Ninth Circuit's decision in this case has ignored legislative history and thereby subverted congressional intent regarding expeditious OCS inventorying and development. RDC and ASIA represent individuals and organizations engaged in such inventorying and development who have been deprived of the ability to do so efficiently and economically. The Ninth Circuit has attempted to redefine the public and national interest in a manner unintended by Congress and clearly harmful to amici's interest in their members' ability to pursue their livelihood. Amici in this case are in the position of representing all parties who ask that the courts respect the policy choices of our national representatives.

---

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 774 F.2d 1414 (9th Cir. 1985).

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## STATEMENT OF THE CASE

Amici adopt petitioners' statements of the case as set out in their petitions for writ of certiorari.

## SUMMARY OF ARGUMENT

1. Amici adopt and incorporate herein by reference petitioners' arguments on the ability of trial courts to exercise equitable discretion in granting injunctive relief as articulated by this Court in *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982).

2. Amici adopt and incorporate herein by reference petitioners' arguments on the proper construction of Section 810 of ANILCA, 16 U.S.C. § 3120, within the context of the tiered decision-making process of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1331, *et seq.,* as prescribed by this Court in *Secretary of the Interior v. California,* 464 U.S. 312 (1984).

3. The Ninth Circuit's pronouncement that Congress decided in ANILCA to prefer the protection of subsistence resource use over environmentally sound, expeditious OCS energy development is without foundation in legislative history and contrary to expressed congressional intent.

## ARGUMENT

### LEGISLATIVE HISTORY CLEARLY ESTABLISHES THAT CONGRESS HAS NOT CHOSEN TO PREFER SUBSISTENCE USE INTERESTS OVER REASONABLE OCS DEVELOPMENT

In reaching its decision in *People of the Village of Gambell v. Hodel*, 774 F.2d 1414, the Ninth Circuit appears to engage in the traditional analysis of the propriety of granting or withholding injunctive relief.[1] In so doing, the court passes on its assessment of the competing public interests then before the court. *Id.* at 1425-26. In a section of its public interest analysis dealing with this Court's decision in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, the Ninth Circuit reaches the wholly unexpected conclusion that "[i]t appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration."[2] Having reached this conclusion in order to bolster its *per se* injunction rule by appealing to this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Ninth Circuit repeats this assertion and even amplifies it in its conclusion:

> "The public interest as expressed by Congress in the 1980 amendments to the Conservation Act [*i.e.*, ANILCA] requires that the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must *prevail over our possible energy needs*. Thus, the denial of a preliminary injunction was error because the court misapplied the

---

[1] *See People of the Village of Gambell v. Hodel*, 774 F.2d at 1419-28, for the court's treatment of the usual factors of: (1) probable success on the merits; (2) balance of harms; and (3) public interest.

[2] *Id.* at 1426 n.2.

> law of the circuit concerning the 'unusual circumstances' exception and failed to honor *the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.*" *People of the Village of Gambell v. Hodel,* 774 F.2d at 1428 (emphasis added).

The assertion of a congressional preference for subsistence use preservation is thus central to the court's decision. Such an assertion is ungrounded in legislative history, and is, in fact, directly contrary to expressed congressional intent.

Senate Report No. 413, 96th Cong., 2nd Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, sets out the text with commentary of the legislation that eventually became ANILCA. In discussing the amendments made by the Senate Committee on Energy and Natural Resources to the text of the House of Representatives' bill, H.R. 39, the report notes:

> "The second amendment [to Section 810] clarifies that the requirements of Section 810 are '*procedural*' in that until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes *the proposed action may proceed even though its effect may be adverse to subsistence uses.*" *Id.* at 5178 (emphasis added).

The Ninth Circuit's decision in *People of the Village of Gambell v. Hodel, supra,* is utterly and inexplicably silent on this language. The court, quoting itself in *People of the Village of Gambell v. Clark,* 746 F.2d 572 (9th Cir. 1984), noted that Section 810(a) was enacted " 'to benefit

the Natives,' and to be 'consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses.' " *People of the Village of Gambell v. Hodel,* 774 F.2d at 1425, citing *People of the Village of Gambell v. Clark,* 746 F.2d at 581, *quoting,* 126 Cong. Rec. 29,279 (1980). Consistency and benefit do not amount to a substantive preference in the face of congressional language unavoidably establishing the *procedural* character of the section.

Congress established a procedural requirement that subsistence uses be integrated into the decision-making processes of federal land managers in Alaska. Congress foresaw that even after taking subsistence uses into consideration, there would be occasions when subsistence uses could be adversely affected.[3]. There is no support whatsoever for the position of the Ninth Circuit that Congress intended by Section 810 to create a substantive preference for the protection of subsistence uses over the environmentally sensitive provision of this country's vital energy needs.

## CONCLUSION

In reaching its decision in *People of the Village of Gambell v. Hodel, supra,* interpreting the relationship between the requirements of Section 810(a) of ANILCA, 16 U.S.C. § 3120(a), and the Outer Continental Shelf Lands

[3] 1980 U.S. Code Cong. & Ad. News 5178.

Act Amendments of 1978, and announcing its *per se* rule of mandatory injunctive relief for a *prima facie* violation of an environmental or conservation statute, the Ninth Circuit relied on a mistaken assessment of national policy concerning Alaskan subsistence uses as indicated by congressional intent. This mistaken assessment has had serious negative impacts on amici, and because of the continuing possibility for erroneous construction of national policy should the Ninth Circuit's position not be corrected, amici respectfully urge this Court to grant the writs of certiorari requested by petitioners.

DATED: March, 1986.

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(5) (8)

Nos. 85-1239 and 85-1406

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## JOINT APPENDIX

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CERTIORARI GRANTED JUNE 2, 1986

85 PP

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**JOINT APPENDIX**

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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A85-184CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL,
AN ALASKAN NATIVE IRA ASSOCIATION,
PEOPLE OF THE VILLAGE OF STEBBINS,
AN ALASKAN NATIVE IRA ASSOCIATION,
PLAINTIFFS

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE
UNITED STATES DEPARTMENT OF THE INTERIOR

ARCO ALASKA INC., EXXON CORP. MOBIL
OIL CORP., SHELL OIL CO., TEXACO INC.
AND UNION OIL OF CALIFORNIA,
DEFENDANT-INTERVENORS

---

**RELEVANT DOCKET ENTRIES**

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 3/4/83 | 1 | Complaint For Preliminary And Permanent Injunctive Relief Filed. |
| | 6 | Filed Motion For An Order Granting A Preliminary Injunction. |
| | 7 | Filed Memorandum In Support Of Plaintiffs' Request For A Preliminary Injunction. |
| | | Issued Summons to U.S. DEPT OF INTERIOR, JAMES WATT, UNITED STATES OF AMERICA C/O U.S. ATTY, UNITED STATES OF AMERICA C/O US ATTY ANCH |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 3/10/83 | 12 | Filed Motion For Leave To Intervene As Defendants. |
| | 15 | Filed Statement Of Federal Defendants' Non-Opposition To Motion For Leave To Intervene As Defendants. |
| | 16 | Filed Statement Of Plaintiffs' Non-Opposition To Motion For Leave To Intervene As Defendants. |
| | 17 | Filed Defendant-Intervenors' Answer To Complaint. |
| 3/14/83 | 21 | Filed Order Denying Preliminary Injunction. |
| | 22 | Filed Plaintiff's Notice Of Appeal. |
| 3/16/83 | 24 | Filed Memorandum Of Defendant-Intervenors In Opposition To Motion For Preliminary Injunction with Exhibit 1—The "FEIS" Exhibit 2—Secretarial Issues Document, Exhibit 3—The "DEIS", Exhibit 4—Final Notice Of Sale, Exhibit 5—Consistency Determination accompanying same. |
| 3/17/83 | 32 | Filed Motion To Dismiss. |
| | 33 | Filed Federal Defendant's Memorandum In Support Of Motion To Dismiss And In Opposition To Motion For Preliminary Injunction. |
| | 35 | Filed Plaintiff's Reply To Memorandum Opposing Their Motion For A Preliminary Injunction. |
| 3/29/83 | 43 | Filed Plaintiff's Motion For Summary Judgment. |
| | 44 | Filed Plaintiff's Memorandum In Support Of Their Motion For Summary Judgment with exhibits D, E, F, G, H, I and J attached. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 4/1/83 | 46 | Filed Memorandum Of Defendant-Intervenors In Opposition To Plaintiffs' Motion For Summary Judgment with exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 |
| 4/4/83 | 48 | Filed Minute Order From Chambers setting oral argument on plt's motion for summary judgment for April 1, 1983 at 10:30 am. |
| 4/4/83 | 49 | Filed Court minutes of April 1, 1983 hearing of oral argument on Plaintiff's Motion for summary judgment. |
| 4/4/83 | 52 | Filed in Anchorage the court's Memorandum And Order denying Plt's motion for summary judgment as to both claims for relief. |
| 4/7/83 | 54 | Filed Federal Defendants' Response To Plaintiffs' Motion For Summary Judgment with Certificate of service and exhibits A thru E attached. |
| 4/13/83 | 56 | Filed Notice Of Appeal by plaintiffs, from Order Dismissing the Complaint. Cys to attys |
| | 57 | Filed Notice Of Appeal by plaintiffs, from Order Denying Summary Judgment. Cys attys |
| 4/14/83 | 59 | Filed Memorandum And Order granting summary judgment to federal defendants. |
| | 60 | Filed Judgment granting summary judgment to federal defendants, copies distributed to attorney. Case closed |
| | 62 | Filed plt's Application For Order Granting Injunction Pending Appeal. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 4/14/83 | 63 | Filed Memorandum In Support Of Plaintiffs' Application For Injunction Pending Appeal. (lodged order) |
| | 66 | Filed Federal Defendants' Memorandum In Opposition To Plaintiff's Motion For Injunction Pending Appeal, with certificate of service attached. |
| | 67 | Filed Memorandum Of Defendant-Intervenors In Opposition To Plaintiff's Motion For Injunction Pending Appeal with exhibit 1 and Affidavit Of Service By Hand Delivery attached. |
| | 69 | Filed Memorandum And Order denying pltf's mtn for an injunction pending appeal. |
| 4/18/83 | 71 | Fld CA Order enjoining appellees from awarding any leases on Lease Sale 57; oral argument set 11 am on 4-26-83 in SF—cy: Judge |
| 5/17/83 | 77 | Fld CA Order denying application for injunction; set briefing schedule—cy: judge |
| 1/8/85 | 84 | Fld JUDGMENT from CA w/attach opinion affirming D.C. in part, reversed in part and remanded. Cy: Joan Lee, Donald Cooper, Cynthia Pickering, Carl Bauman & Judge von der Heydt. |
| 4/3/85 | 85 | Fld pltfs' mot for prelim injunct on remand w/atch memo & exhibits (exhibits in red folder behind case file). |
| 4/19/85 | 90 | Fld intvnr/defts' memo in opp to mot for prelim injunct w/atch exhibits. |
| 4/23/85 | 91 | Fld fed defts' opp to mot for prelim injunct w/atch exhibits. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 5/1/85 | 93 | Fld intvnr/defts' notice of filing orig afdvt of Hugh P. Bushnell. |
| 5/2/85 | 96 | Fld pltfs' resp to defts' opp to mot for prelim injunct w/atch exhibits. |
| 5/9/85 | 102 | Fld D-3 to D-8s' mot for leave to file intervenor's response re plts' reply w/attach response & affs. |
| 5/23/85 | 103 | Fld cy MEMO & ORDER re A85-201/A85-184 CIV, pltf mot for PI DENIED. cy-cnsl. |
| 5/24/85 | 104 | Fld pltf's Notice of Appeal re Order of 5/23/85, dkt#103. cc: cnsl. |
| 5/30/85 | 105 | Fld MO granting inter-defts' mot for leave to file add material. cc: cnsl. |
| 5/30/85 | 106 | Fld MO stating court will not entertain mot for stay pending appeal. cc: cnsl. |
| 1/3/86 | 111 | FLD CA Judgment. Remanded & reversed. cy: James Bamberger, Bruce Landon, Carl Bauman, Judge von der Heydt. |
| 1/8/86 | 112 | Fld PRELIM INJUNCTION. No bond required at this time. Cy Cnsl & A85-201 CIV. Cy O&J 2685. |
| 1/31/86 | 113 | Fld joint mot for stay. |
| 1/31/86 | 113 | Fld ORDER approving joint mot for stay. Cy Cnsl. |

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

---

A85-201CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

AMOCO PRODUCTION CO. ARCO ALASKA, INC., EXXON CORP., SHELL WESTERN E&P, INC., OHIO ALASKA PETROLEUM CO., TEXACO, INC., AND UNION OIL CO. OF CALIFORNIA, DEFENDANT-INTERVENORS

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**RELEVANT DOCKET ENTRIES**

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 4/25/85 | 1 | Fld cmplt. Issued summs. |
| 4/25/85 | 2 | Fld pltf mot for PI w/exhbs A-J (exhbs fld in red binders case file) w/memo. |
| 4/25/85 | 3 | Fld pltf req to consolidate this action w/A85-184 CIV. |
| 5/6/85 | 4 | Fld stip re application for intervention as defts & stip for ext of time for answer dedlne to match fed defts due date. |
| 5/8/85 | 6 | Fld fed defts oppo to pltf request to consolidate. |
| 5/9/85 | 4 | Fld ORDER granting intervention of add'l defts. cy cnsl |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 4/9/85 | 7 | Fld D-3 thru D-9 oppo to pltf mot for consolidation. |
| 4/9/85 | 8 | Fld pltf resp to deft oppo to req to consolidate. |
| 4/10/85 | 9 | Fld fed deft oppo to mot for PI w/exhbs (exhbs in red binder behind case file) (exhbs #2, #4, #5, #6-#10, no #1 or #3 fld) |
| 4/10/85 | 11 | Fld D-3 thru D-9 memo in oppo to pltf mot for PI affs & exhbs D, E, & F & G (exhbs fld in red binder behind case file) |
| 4/17/85 | 12 | Fld pltf resp to deft oppo to mot for PI w/exhbs. |
| 4/17/85 | 13 | Fld City of St. Paul mot for lv to file amicus curiae brief w/memo & exhb (table of contents of brief). |
| 4/21/85 | 14 | Fld MO; this case hereby assigned to Judge vdH. cy cnsl, Judge vdH. |
| 4/23/85 | 17 | Fld MEMO & ORDER; pltf mot for PI denied. cy cnsl, A85-184 CIV. |
| 4/30/85 | 18 | Fld MO; City of St. Paul's mot for lv to file amicus brief GRANTED, pltf mot to consol hrings of pnding mots for PI in A85-201/A85-184 GRANTED, cases otherwise not consol. cy cnsl. |
| 4/30/85 | 19 | Fld MO; crt will not entertain mot for stay pending appeal. cy cnsl, A85-184. |
| 6/24/85 | 20 | Fld D-1 & D-2's answer. |
| 7/2/85 | 22 | Fld D-3 thru D-9 answer |
| 7/19/85 | 22 | Fld Desig. of record by Intervenor-Appellee Amoco Prod. Co. |
| 7/30/85 | | Record mailed to 9CAA |
| 1/8/86 | 26 | Fld cert cy PRELIM INJUNC. No bond required at this time. Cy Cnsl & O&J 2685. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1/31/86 | 27 | Fld defts' joint mot for stay. |
| 2/3/86 | 27 | Fld ORDER granting stay until 3 weeks after U.S. Supreme Court decides whether it will accept certiorari on decision of 9th Circuit. cc:cnsl |

# IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE NINTH CIRCUIT

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85-3877

PEOPLE OF THE VILLAGE OF GAMBELL,
PEOPLE OF THE VILLAGE OF
STEBBINS, AND NUNAM KITLUTSISTI, APPELLANTS

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND
THE UNITED STATES DEPARTMENT
OF THE INTERIOR, APPELLEES

ARCO ALASKA, INC., AMOCO PRODUCTION CO., ET AL.,
INTERVENOR-APPELLEES

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**RELEVANT DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 6/3/85 | DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. EMK |
| 6/3/85 | Filed aplt's emergency motion for injunction pending appeal. (CIVATT) 6/1 -dmf- |
| 6/3/85 | Filed aplees' (Amoco Production, et al) memorandum in opposition to motion for injunction pending appeal. (CIVATT) 6/3 -dmf- |
| 6/4/85 | Filed federal aplees' opposition to motion for injunction pending appeal. (CIVATT) 6/4 -dmf- |
| 6/5/85 | Filed order (SNEED, NELSON, BEEZER) Exploration of the Alaska Continental Shelf pursuant to Lease Sales No. 57 and No. 83 by the intervenors-appellees oil companies is temporarily stayed pending further order of the court. sm Misc. MoCal 6/5 |

| DATE | PROCEEDINGS |
|---|---|
| 6/6/85 | Filed order (SNEED, NELSON, NORRIS) Plaintiff's emergency motion for injunction pending appeal is denied. The temporary stay entered June 5, 1985, has expired. Within 7 days of the entry of this order, the Secretary of the Interior, in conjunction with the intervenors-appellees, shall file with the court a hold harmless agreement that will protect appellants from any consequences resulting from significant restrictions upon subsistence uses by appellants of their lands. See U.S.C. 3120. This panel shall retain jurisdiction of the matter for the purpose of reimposing a temporary stay should the panel disapprove the form and substance of the hold harmless agreement. Upon submission for decision, the merits panel shall determine whether the hold harmless agreement should remain in effect. This appeal is expedited. No prebriefing conference will be held. Appellants shall file their opening brief on or before June 28, 1985. Appellees shall file their answering briefs on or before July 19, 1985. Appellants may file a reply brief within 7 days of the service date of appellee's briefs. No extensions of time will be granted. The Clerk shall calendar this case for oral argument in Seattle in September. sm |
| 6/12/85 | Filed aplt's waiver of add'l briefing, request for immediate transfer to merits panel, and request for immediate argument, (6/11), (CIVATT). jw |
| 6/13/85 | Filed aple's & Secretary of Interior's Hold Harmless Agreement, (CIVATT). jw |
| 6/17/85 | Filed aplt's objection to "Hold Harmless Agreement" (CIVATT) 6/14 -dmf- |

| DATE | PROCEEDINGS |
|---|---|
| 6/18/85 | Rec'd affidavit of Joseph G. Jorgensen in support of aplts' objection to "Hold Harmless Agreement." (CIVATT) -dmf- |
| 6/18/85 | Filed federal aplees' opposition to aplts' request for immediate transfer to merits panel and request for immediate payment. (CIVATT) 6/17 -dmf- |
| 6/19/85 | File intervenor-aplees' response to aplts' objection to "Hold Harmless Agreement." (CIVATT) 6/18 -dmf- |
| 6/20/85 | Rec'd affidavit of Charles C. Hughes, Phd., in support of objection to "Hold Harmless Agreement." (CIVATT) -dmf- |
| 6/21/85 | Filed feder aple's response to aplt's objection to hold harmless agreement, (6/20/85), (CIVATT). jw |
| 6/21/85 | Filed order (SNEED, NELSON, NORRIS) The panel has reviewed the hold harmless agreement submitted on June 13, 1985, by the Secretary of the Interior, in conjunction with the intervenor-appellees, in compliance with this court's June 6, 1985 order. The panel has concluded that, with two exceptions, the hold harmless agreement is adequate to protect appellants' interests at this stage of the proceedings. The panel that decides this appeal on its merits may review the agreement to determine its continued adequacy. This panel makes the following two changes in the agreement: (1) Paragraph 4 is amended to provide that appellants have the initial burden to establish only that a significant restriction upon subsistence uses has been proximately caused by exploratory drilling or related operations of intervenors-appellees. Once ap- |

| DATE | PROCEEDINGS |
|---|---|
| | pellants have established the existence of a subsistence restriction, the burden shall shift to intervenors-appellees to establish that the responsibility lies with a particular company or companies. If intervenors-appellees are unable to do so, then all companies conducting operations in the relevant lease area of the type that caused the restriction shall be jointly and severally liable for damages to appellants. (2) Paragraph 7 is amended to provide that the hold harmless agreement shall remain in effect until further order of this court. Appellants' waiver of additional briefing, request for immediate transfer to merits panel, and request for immediate argument are denied. The parties shall abide by the briefing schedule established in the June 6, 1985 order. sm |
| 7/1/85 | Filed as of June 28, orig & 15 Aplt's opening briefs and 5 excerpts of record in 2 volumes. (38 pages). 6/27 tu |
| 7/9/85 | Filed, as of Jul 5, intervenor-aplees' (Arco Alaska & Exxon) petition for clarification or reconsideration of order dated 6/21/85. (CIVATT) 7/5 -dmf- |
| 7/22/85 | Filed order (NELSON, NORRIS) The motion by intervenor-appellees for clarification or reconsideration of this court's order of June 21, 1985, is granted in part. Paragraph 7 of the hold harmless agreement remains intact in all respects except as to the time for termination of the agreements. As directed in the June 21 order, paragraph 7 is amended to provide that the hold harmless agreement shall remain in effect until further order of this court. In all other respects, the motion for clarification or reconsideration is denied without prejudice to |

| DATE | PROCEEDINGS |
|---|---|
| | renewal of the motion before the panel that considers this case on its merits. sm |
| 7/23/85 | Filed as of 7/22, orig and 15 copies of aple's (FEDERAL) brief, (50 pgs), 7/19. (PANEL). |
| 7/23/85 | Filed as of 7/22, orig and 15 copies of aple's (AMOCO PRODUCTION) brief and 5 copies of aple's supplemental excerpts of record, (in 2 volumes), (49 pgs), 7/19, (PANEL). jw |
| 7/25/85 | Filed motion (City of St. Paul) for leave to file amicus brief/memorandum in opposition. (panel) 7/23 -dmf- |
| 7/30/85 | Filed 5 copies of aplt's corrected excerpts, vol. 1 jw (DO NOT USE EXCERPTS VOL. JUNE 28, 1985) |
| 8/1/85 | Rec'd as of 7/31, orig and 15 copies of aplt's reply brief, (32 pgs), (7/30, (PANEL). |
| 8/5/85 | Filed order (DEPUTY CLERK) The City of St. Paul's motion to file an amicus brief/memorandum in opposition to appellants' motion for preliminary injunction is GRANTED. sm |
| 8/23/85 | Filed aplee's motion fixing the expiration date of the hold harmless agreement. (panel) 8/22 -dmf- |
| 8/28/85 | Filed "Stipulation" that the Hold Harmless Agreement filed by federal defendants and intervenors appellees, Amoco Production, et al will terminate to (panel). jr 8/26/ & 27/85 |
| 9/4/85 | CAUSE ARGUED & SUBMITTED TO: PREGERSON, ALARCON, CJJ, DIMMICK (W. WASH.), DJ. -dmf- |
| 10/25/85 | ORDERED OPINION (ALARCON) FILED AND JUDGMENT TO BE FILED AND ENTD. |

| DATE | PROCEEDINGS |
|---|---|
| 10/25/85 | FILED OPINION – REVERSED AND REMANDED. jw (Judge Dimmick Dissenting) |
| 10/25/85 | FILED AND ENTERED JUDGMENT. jw |
| 11/7/85 | Filed stipulated motion for limited stay of the mandate (PANEL) sm |
| 12/3/85 | Rec'd, as of 11/29/85, intervenor/aples letter dated 11/27/85 re: stipulated motion for limited stay of mandate, etc to (panel). jr |
| 12/26/85 | Filed order (Pregerson, Alarcon & Dimmick) the stipulated motion for limited stay of mandate filed 11/7/85 is dismissed as moot. The mandate in the above-entitled case shall be filed forthwith. |
| 12/26/85 | Mandate Issued |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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No. N 83-03-Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

*v.*

JAMES S. WATT, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

---

**COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

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**INTRODUCTION**

1. This action seeks to enjoin the Secretary of the Interior, James S. Watt, from holding Outer Continental Shelf Lease Sale 57. That lease sale will offer oil and gas companies about 2.4 million acres of Outer Continental Shelf land. The OCS land is located in Norton Sound. The lease sale is scheduled for March 15, 1983.

2. The complaint sets out two alternative legal theories why Secretary Watt should be enjoined from holding the sale. Both theories are based on the subsistence rights of Natives living in the Norton Sound region. The first theory is that Mr. Watt did not follow the procedures required by Section 810 of the Alaska National Interest Lands Conservation Act. This section provides a detailed set of procedures that must be followed before Secretary Watt leases public lands.

3. The second legal theory is based on the Alaska Native Claims Settlement Act. ANCSA terminated certain Native hunting and fishing rights. The language of ANCSA, and the historical connection binding it to Section 810 of ANILCA, establish that the rights extinguished by ANCSA are the same rights protected by Section 810. If Section 810 does not apply to OCS land, ANCSA does not apply. In this case, the Natives retain aboriginal claims to the OCS land, which must be adjudicated before any lease sale can take place.

**PARTIES**

4. Plaintiff Native Village of Gambell and Plaintiff Native Village of Stebbins are Indian tribes or bands organized under the Indian Reorganization Act. 28 USC § 461 *et. seq.* The governing bodies of these villages are recognized by the Secretary of the Interior. The Native village of Gambell is located on St. Lawrence Island. The Native village of Stebbins is located on the Southern shore of Norton Sound on Cape Stephens.

5. Defendant James S. Watt is the Secretary of the Interior. He officially resides in the District of Columbia. The Department of the Interior is the federal agency responsible for Lease Sale 57.

**JURISDICTION AND VENUE**

6. This action arises under the Constitution, laws, and treaties of the United States. It involves claims in excess of $10,000. Jurisdiction is based on 28 USC § 1331; 28 USC § 1332; 28 USC § 1337; 28 USC § 1346; and 28 USC § 1362. Venue properly lies in the District Court of Alaska under 28 USC § 1391(b); 28 USC § 1391(e)(2); and 28 USC § 1391(e)(3).

**STATEMENT OF THE CASE**

7. The Bureau of Land Management published a Notice of Sale for Outer Continental Shelf Lease Sale 57 on February 10, 1983. The notice announces that 418 blocks of land will be offered for oil and gas lease. The blocks consist of 2.4 million acres of Outer Continental Shelf land located off the Alaskan coast. The lease sale is scheduled for March 15, 1983. It will permit successful bidders to explore for, develop, and produce oil and gas.

8. The lease sale and the resulting oil development will injure the subsistence economy of the Norton Sound region. The subsistence economy is the process by which Natives harvest local fish and game and then directly consume it, exchange it on local trade networks, or sell it for cash. The subsistence economy is essential for the continued existence of Natives living in the Norton Sound basin. For example, over ninety percent of the diet of villagers living in Gambell consists of locally-harvested walrus and other marine mammals, and the remainder of the diet is largely composed of other subsistence animals.

9. Oil and gas development will harm the subsistence economy in two ways. It will reduce the animal populations forming the basis of the subsistence economy. And it will decrease the Natives' ability to purchase equipment needed to harvest the resource. These two effects will diminish the output of the subsistence economy, threatening the existence of Native villagers.

10. Secretary Watt has not followed the procedures outlined in Section 810 of the Alaska National Interest Lands Conservation Act in preparing the Norton Sound lease sale. Section 810 is designed to protect the subsistence economy which supports Alaskan Natives. It requires the Secretary to make certain findings and to effectuate certain procedures before leasing or disposing of public lands.

11. Members of the Plaintiff organizations, and their lineal ancestors, have used and occupied substantial portions of the lands to be conveyed in the Norton Sound lease sale. The Plaintiffs claim traditional hunting and fishing rights. These rights include the right to hunt seal, walrus, and whale, and the right to fish for herring and salmon.

12. The tribal councils of the Plaintiff villages have not consented to the leases affecting the land owned, used, or occupied by them.

**First Cause of Action**

13. Secretary Watt has not followed the procedures or made the findings required by Section 810 of the Alaska National Interest Lands Conservation Act. This failure injures the Plaintiffs' interest.

**Second Cause of Action**

14. Secretary Watt intends to lease lands encumbered by Native claims. The lease would injure the plaintiffs' possessory interest, and would violate the trust responsibilities Secretary Watt owes to the Alaskan Natives.

**RELIEF**

The plaintiffs request the following relief:

1. That this court issue a preliminary injunction enjoining Secretary Watt from leasing the Norton Sound basin until such time as:

a. He makes the findings and determinations required by Section 810 of ANILCA or, alternatively;

b. This court adjudicates Native claims to the Norton Sound basin.

2. That Secretary Watt and his subordinates be permanently enjoined from leasing the Norton Sound basin.

3. That the plaintiffs be awarded costs and attorneys fees.

Respectfully submitted,

ALASKA LEGAL SERVICES CORPORATION

by: /s/ DONALD COOPER

Donald Cooper
Bruce Horowitz
Joan Lee
Robert Hickerson
Heather Noble
*Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 985-201 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiffs in this action, the Native Village of Gambell and Nunam Kitlusisti, seek to permanently enjoin all activities resulting from Federal Oil and Gas Lease Sale 83 for the Navarin Basin, Alaska. Plaintiffs also seek an Order declaring Sale 83 to be invalid and any leases resulting from that sale to be null and void.

2. Plaintiffs raise two arguments in support of their claim that Sale 83 is invalid. First, the Secretary of the Interior failed to comply with the requirements of section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, in selecting the areas offered in Sale 83. The second argument is that Title VIII and section 810 of ANILCA impose a trust responsibility on the Secretary to minimize the impact of oil and gas leasing, exploration, and development on Native subsistence activities. By leasing lands of low or marginal oil and gas potential, the Secretary breached this trust responsibility.

3. Plaintiffs seek to invalidate Sale 83 and leases resulting from that sale in order to protect their subsistence hunting and fishing rights. In holding Sale 83, the Secretary of the Interior ignored congressional directives that he lease in a manner that caused the least adverse impact on subsistence. Oil exploration and development activities on the leased tracts present an unreasonable threat of injury to primary subsistence resources needed by residents of St. Lawrence Island and western Alaska.

**PARTIES**

4. Plaintiff Native Village of Gambell is an Indian tribe or band reorganized under the Indian Reorganization Act as amended, 25 U.S.C. § 461 *et seq.*. The governing body of this village is recognized by the Secretary of the Interior. The Native Village of Gambell is located on St. Lawrence Island in the Bering Sea.

5. Plaintiff Nunam Kitlusisti is a non-profit corporation organized under the laws of the State of Alaska. It represents subsistence users throughout the Yukon-Kuskokwim Delta of southwest Alaska, working on resource development and environmental issues which affect their subsistence way of life. Nunam Kitlusisti is governed by a Board of Directors nominated by constituent Yukon-Kuskokwim villages. Its offices are located in Bethel, Alaska.

6. Defendant Donald P. Hodel is the Secretary of the Interior. He is the official successor to William P. Clark, who was Secretary of the Interior at the time Lease Sale 83 was held. Secretary Hodel is responsible for administering the Outer Continental Shelf leasing program established pursuant to the Outer Continental Shelf Lands Act as amended, 43 U.S.C. § 1331 *et. seq.*. Defendant Donald P. Hodel officially resides in Washington, D.C.

## JURISDICTION AND VENUE

7. This action arises under the Constitution, laws, and treaties of the United States. Jurisdiction is proper under 28 U.S.C. § 1331; 28 U.S.C. § 1337; 28 U.S.C. § 1346; 28 U.S.C. § 1362; and 16 U.S.C. § 3120. Venue properly lies in the District Court for the District of Alaska under 28 U.S.C. § 1391(b), (c), and (e).

## STATEMENT OF THE CASE

8. On March 16, 1984, the Secretary of the Interior published notice of his intent to sell some 3,700 blocks in the Navarin Basin southwest of St. Matthew Island in the Bering Sea. 49 Fed. Reg. 10,058 (March 16, 1984). The sale was held on April 16, 1984. As a result of this sale, some 185 leases were issued to successful bidders.

9. The Navarin Basin is home to many primary subsistence resources consumed by residents of Gambell and the coastal villages of the Yukon-Kuskokwim Delta region. Among other things, it is the winter feeding ground of the bowhead whale, an endangered species central to the subsistence culture of the people of Gambell. The migration routes of various species of marine mammals, fish, and migratory birds traverse the Navarin Basin area. These marine mammals, fish, and migratory birds provide more than 80% of the food consumed by residents of Gambell and villages in the Yukon-Kuskokwim region.

10. Oil and gas exploration and development in the Navarin Basin will harm the subsistence economies of Gambell and the villages of the Yukon-Kuskokwim Delta region. The subsistence economy is the process by which Alaskan Natives harvest local fish and game and then directly consume it, exchange it on local trade networks, or sell it for cash. For the people of Gambell and the villages of the Yukon-Kuskokwim Delta region, the subsistence economy is essential for their survival.

11. Oil and gas exploration and development will harm the subsistence economies of the affected villages in a number of ways. For example, oilspills will directly injure marine mammals, fish, and migratory birds needed for subsistence; noise from exploration and development activities will cause subsistence resources to alter their traditional migration patterns, thereby reducing their availability for subsistence users; and inflation caused by oil and gas activity will decrease Natives' ability to purchase equipment needed to harvest subsistence resources.

12. The Secretary of the Interior did not follow the requirements of section 810 of the Alaska National Interest Lands Conservation Act in preparing for Lease Sale 83. Section 810 is designed to protect rural Alaskan Natives' opportunity to pursue their customary and traditional subsistence way of life.

13. In the context of OCS leasing, section 810 of ANILCA requires the Secretary to:

(a) perform detailed subsistence impact studies;
(b) select areas to be leased in a manner that minimizes the conflict between oil and gas and subsistence; and
(c) determine whether leasing any of the offered areas may significantly restrict subsistence uses or resources, and if it may, the Secretary must:
    (1) give notice and hold hearings in the affected areas,
    (2) consult with local fish and game advisory committees, and
    (3) make specific detailed findings regarding the impact of the proposed lease sale on subsistence uses and resources.

14. Title VIII of ANILCA was passed for the benefit of Alaskan Natives. It imposes a trust responsibility on the Secretary to manage lands, including the OCS, in a manner that will cause the least adverse impact on Native subsistence users and resouces.

**FIRST CAUSE OF ACTION**

15. The Secretary of the Interior did not comply with section 810 of ANILCA in determining to offer the 3,700 blocks for lease in the Navarin Basin. As such, the sale was unlawful, and the leases resulting from that sale are invalid.

**SECOND CAUSE OF ACTION**

16. By failing to comply with the section 810 requirement that he select blocks in a manner designed to minimize the conflict between oil and gas activities and subsistence, the Secretary breached his trust obligation to ensure that oil and gas activities cause the least adverse impact on subsistence uses and resources.

**PRAYER FOR RELIEF**

17. Plaintiffs request the following relief:

(a) That this court enter an Order enjoining the Secretary from authorizing, permitting, or otherwise allowing any lessee from conducting any exploration or development activities on their Sale 83 lease(s);

(b) That this court enter an Order declaring Sale 57 to be null and void and any leases resulting therefrom to be equally invalid;

(c) That this court enter an Order awarding plaintiffs their costs and reasonable attorneys fees; and;

(d) That this court grant plaintiffs such other relief as would be just and equitable.

Respectfully submitted this 25th day of April, 1985.

ALASKA LEGAL SERVICES CORPORATION

/s/ JAMES A. BAMBERGER

James A. Bamberger
*Attorney for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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No. N83-003-Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

ARCO ALASKA, INC., *et al.*, DEFENDANT-INTERVENORS.

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**AFFIDAVIT OF EARL D. STOUT**
**EXHIBIT E**

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**AFFIDAVIT OF EARL D. STOUT**

THE STATE OF TEXAS
COUNTY OF HARRIS

The undersigned affiant, Earl D. Stout, personally appeared before me, Charles Raymond LeMay, Notary Public in and for the County of Harris, state of Texas, on this 17th day of April 1985, and deposes and states to the best of his information and belief:

1.

I am the Manager of the Alaska/Pacific Exploration Division of Exxon Company, U.S.A., a division of Exxon Corporation. In this capacity, I supervise all of Exxon's offshore exploration programs in Alaska and the Pacific, including the area covered by Sale 57 in the Norton Sound.

I have held this position since the spring of 1982, and am thus intimately familiar with Exxon's Norton Sound activities since the inception of this lawsuit.

2.

Exxon acquired 41 leases at Sale 57, in March of 1983, at a cost in excess of $258,000,000. Geological and geophysical costs and lease rentals raise the net bonus cost of acquisition by in excess of $12,400,000.

3.

During the summer of 1983, Exxon engaged in site clearance, a type of seismic activity, of roughly ten blocks on which it considered, at that time, that exploratory drilling might possibly occur during the 1984 exploration season. During the summer of 1984, Exxon continued its Norton exploration by drilling two exploratory wells, at a cost of approximately $16,000,000, on its Sale 57 leases. Exxon also conducted a seismic program on its Norton leases during the 1984 open water season. Exxon conducted all of this exploration in complete compliance with all applicable laws and regulations governing OCS activities, under plans and permits approved by the agencies responsible for implementing the statutory scheme. To the best of my knowledge and belief, no adverse effects whatsoever, whether environmental or economic, have resulted from any of the industry activity, nor has any party complained of any such adverse effects as a result of exploratory activities since the sale occurred in 1983.

4.

During the 1985 drilling season, Exxon plans to drill two additional wells on its Norton leases. Both well locations are in the St. Michael Protraction Area; one is on Block 54

and the other on Block 361. According to the Environmental Impact Statement for Sale 57 and the draft for the upcoming Sale 100, neither of these blocks is located in an area of particular environmental sensitivity. Both blocks are at least 24 miles from shore.

5.

Exxon plans to begin drilling the first of these wells on or near June 1. Commencement of the second is currently planned for mid to late July. Present estimates require a minimum of 45 days to drill each well, with further time required for testing should hydrocarbons be encountered. Time is of the essence due to the limited drilling window available in Alaska; because of the seasonal and climatic operating conditions in the Norton Sound, any delay will preclude the drilling of the second well. Inability to proceed to the drilling of the second well during the 1985 season as currently scheduled may, because of lost efficiencies related to timing, render the drilling of the second well at a later date uneconomic. Such inability to expeditiously evaluate the vital national resource reserves potentially underlying these Norton leases will cause enormous waste not only to Exxon as a company, but to the public at large as well.

6.

Exxon's Plan of Exploration (POE) and accompanying Environmental Report for its Sale 57 leases received the approval of the Minerals Management Service (MMS) on December 28, 1983. The state of Alaska approved Exxon's certification that all activities conducted under the POE would be conducted consistently with the Alaska Coastal Management Program on April 25, 1984. Applications for Permits to Drill (APDs) the two wells planned for the 1985 season were filed with the MMS on February 21 and March 20, 1985 pursuant to 30 C.F.R. § 250.36. Approval

of the APDs is expected in the next few weeks. Publication of the final National Pollutant Discharge Elimination System (NPDES) Permit for the Norton Sound area is expected imminently. Issuance of this permit and approval of the Applications for Permit to Drill are the sole remaining regulatory procedures required prior to Exxon's spudding of the first well planned.

7.

The only seismic activity planned relative to exploration of Exxon's Sale 57 leases consist of site clearance of three blocks preparatory to the drilling of the two exploratory wells described above. This seismic work is necessary to clear the area of any potential sea floor instabilities and to ensure safe operating conditions on the lease block in question. Bottom coring "shallow" geologic surveys and the "high resolution" seismic programs which use a small energy source are required pursuant to the OCS Orders governing operations on the Alaska OCS. (Alaska OCS Region, OCS Order 2.1.3.) "High resolution" seismic programs, with their small energy source, have a far more limited range than the "deep seismic" surveys which companies typically perform prior to a lease sale to determine the presence of potential hydrocarbon-bearing structures.[1]

8.

Should drilling be delayed, and as a function of any delay, Exxon will face losses which now approximate $4,000,000, and which will rise to nearly $10,000,000 by May 30, 1985, from existing contract commitments alone.

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[1] Exxon (as well as other companies) may also conduct deeper seismic in the Norton area in preparation for OCS Sale 100. These operations are not related to Exxon's current exploration of its Sale 57 tracts.

Upon departure of the drilling rig from Seward, currently scheduled for May 23, Exxon's exposure, in the event of any delay, will escalate dramatically by at least $2,275,000. These cancellation and damages costs will be in addition to the even larger, and potentially immeasurable, losses that Exxon will suffer if unable to evaluate the oil and gas potential of its already enormous investment, in the form of lease bonuses, rental payments, 1984 drilling costs, geological and geophysical expenditures, and the time value of money associated with all of the above, in its Norton Sound leases.

9.

For all of the above reasons, since any delay caused by issuance of a preliminary injunction will result in enormous and irreparable damage, Exxon should be allowed to proceed, as scheduled and without delay, in its 1985 exploration of its Sale 57 leases in Norton Sound.

/s/ EARL D. STOUT,
Earl D. Stout, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME THIS 17TH DAY OF APRIL 1985, AT HOUSTON, HARRIS COUNTY, TEXAS.

/s/ CHARLES RAYMOND LEMAY
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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No. A85-184-Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

ARCO ALASKA, INC., *et al.*, INTERVENOR-DEFENDANTS.

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**AFFIDAVIT OF HUGH P. BUSHNELL**

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**AFFIDAVIT OF HUGH P. BUSHNELL**

THE STATE OF TEXAS
COUNTY OF HARRIS

The undersigned affiant, Hugh P. Bushnell, personally appeared before me, Vicky Jackson, Notary Public in and for the County of Harris, state of Texas, on this 30th day of April 1985, and deposes and states to the best of his information and belief:

1.

I am the Operations Manager of the Alaska/Pacific Exploration Division of Exxon Company, U.S.A., a division of Exxon Corporation. In this capacity, I supervise all of Exxon's offshore exploration operations in Alaska and the Pacific, including the area covered by Sale 57 in the Norton Sound. I have held positions within the Alaska/Pacific

Division since the summer of 1978, and am thus intimately familiar with Exxon's Norton Sound activities since the inception of this lawsuit.

2.

Exxon acquired 41 leases at Sale 57, in March of 1983, at a cost in excess of $258,000,000. Geological and geophysical costs and lease rentals raise the net bonus cost of acquisition by in excess of $12,4000,000.

3.

During the summer of 1983, Exxon engaged in site clearance, a type of seismic activity, of roughly ten blocks on which it considered, at that time, that exploratory drilling might possibly occur during the 1984 exploration season. During the summer of 1984, Exxon continued its Norton exploration by drilling two exploratory wells, at a cost of approximately $16,000,000, on its Sale 57 leases. Exxon also conducted a seismic program on its Norton leases during the 1984 open water season. Exxon conducted all of this exploration in complete compliance with all applicable laws and regulations governing OCS activities, under plans and permits approved by the agencies responsible for implementing the statutory scheme. To the best of my knowledge and belief, no adverse effects whatsoever, whether environmental or economic, have resulted from any of the industry activity, nor has any party complained of any such adverse effects as a result of exploratory activities since the sale occurred in 1983.

4.

During the 1985 drilling season, Exxon plans to drill two additional wells on its Norton leases. Both well locations are in the St. Michael Protraction Area; one is on Block 54

and the other on Block 361. According to the Environmental Impact Statement for Sale 57 and the draft for the upcoming Sale 100, neither of these blocks is located in an area of particular environmental sensitivity. Both blocks are at least 24 miles from shore.

5.

Exxon had originally planned to begin drilling the first of these wells on or near June 1, with the second planned for mid to late July. An unusually harsh Alaska winter, resulting in a later than normal ice break-up in the Norton Sound, has pushed the projected spud date for the first Norton well to mid-June and that of the second well to late July or early August. Estimates require a minimum of forty-five (45) days to drill each well, with further time required for testing should hydrocarbons be encountered. As this year's ice conditions demonstrate, time is of the essence in scheduling exploratory activities in Alaska. Seasonal and climatic operating conditions result in an already naturally limited drilling window. Any further delay will preclude the drilling of the second well. Inability to proceed to the drilling of the second well during the 1985 season as currently scheduled may, because of lost efficiencies related to timing, render the drilling of the second well in another season uneconomic. Such inability to expeditiously evaluate the vital natural resource reserves potentially underlying these Norton leases will cause enormous waste not only to Exxon as a company but to the public at large as well.

6.

Should drilling be further delayed, and as a function of any delay, Exxon faces losses which now approximate $4,210,000, and which will rise to nearly $10,000,000 by mid-June, from outstanding contract commitments alone. Upon departure of the drilling rig from Seward, Exxon's

exposure, in the event of further delay, will escalate dramatically by at least $2,275,000. This departure date, originally scheduled for May 16, has already been delayed until early June, as outlined above, due to the delay in commencement of the Norton open water season. These cancellation and damage costs will be in addition to the even larger losses that Exxon will suffer if unable to evaluate the oil and gas potential of its already enormous investment, in the form of lease bonuses, rental payments, 1984 drilling costs, geological and geophysical expenditures, and the time value of money associated with all of the above, in its Norton Sound leases.

7.

Each day that Exxon endures the uncertainty associated with the pending preliminary injunction motion entails ever increasing losses resulting from the perpetuation of existing commitments. Exposure due to these commitments could be significantly minimized, were the court to issue its decision on the pending motion expeditiously. Savings to Exxon which would result from an expedited decision approach $21,000 on a per diem basis. Conversely, with each day of uncertainty and delay, Exxon invests yet another $21,000 in its Norton Sound leases.

8.

For all of the above reasons and in the interest of economy, efficiency, and equity, Exxon requests that an expedited decision be issued in the case.

/s/ HUGH P. BUSHNELL,
Hugh P. Bushnell, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME THIS 30TH DAY OF APRIL 1985, AT HOUSTON, HARRIS COUNTY, TEXAS.

/s/ VICKY JACKSON
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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Case No. A85-201 Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

AMOCO PRODUCTION COMPANY, ET AL., INTERVENOR-DEFENDANTS.

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**AFFIDAVIT OF EARL D. STOUT**
**EXHIBIT A**

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**AFFIDAVIT OF EARL D. STOUT**

The State of Texas
County of Harris

The undersigned affiant, Earl D. Stout, personally appeared before me, Charles Raymond LeMay, Notary Public in and for the County of Harris, state of Texas, on this 8th day of May 1985, and deposes and states to the best of his information and belief:

1.

I am the Manager of the Alaska/Pacific Exploration Division of Exxon Company, U.S.A., a division of Exxon Corporation. In this capacity, I supervise all of Exxon's

petroleum exploration programs for onshore and offshore Alaska including the area covered by Outer Continental Shelf (OCS) Lease Sale 83—Navarin Basin. I have held this position since the spring of 1982 and am thus intimately familiar with Exxon's participation in Sale 83 and its planned exploration activities in the Navarin Basin.

2.

I participated in and actually supervised the bidding process employed by Exxon's Alaska/Pacific Division in connection with Sale 83. As a result of Exxon's efforts, it was awarded 61 leases at Sale 83, which was held on April 27, 1984, for a net bonus and rentals cost in excess of $167,000,000. Exxon's pre-lease sale costs (geological and geophysical data acquisition and processing, overhead, research, and evaluation) associated with Sale 83 make Exxon's total net acquisition cost approximately $208,000,000.

3.

Immediately following Sale 83, Exxon initiated preparatory activities necessary to allow it to permit exploratory drilling in the 1985 drilling season. During the summer of 1984, Exxon conducted site clearance activities, a type of shallow seismic survey, over two geologic prospects (roughly 14 lease blocks) in the Navarin Basin on which Exxon was considering exploratory drilling during the 1985 exploration season. These site clearance activities cost Exxon approximately $1,138,000. At the same time, Exxon arranged for preparation of an environmental report and orientation program required by Minerals Management Service (MMS) regulations (30 C.F.R. § 250.34) and a stipulation included in the leases granted to Exxon. To date, Exxon has paid more than $59,000 for the preparation of this program. On November 21, 1984,

Exxon submitted its Navarin Basin Plan of Exploration (POE), Environmental Report, and emergency response plans to the MMS in Anchorage.

4.

I am informed that following Exxon's submission of its POE on November 21, 1984, the MMS, on November 28, 1984, deemed Exxon's POE completed and forwarded it to the state of Alaska and other federal agencies for review. I am further informed that the MMS notified local communities, individuals, and groups who have previously expressed an interest in reviewing and commenting on exploration plans for the Navarin Basin, including Nunam Kitlusisti, of the submission of Exxon's POE. On December 28, 1984, the MMS, after preparing an Environmental Assessment which included an evaluation under Section 810 of ANILCA, approved Exxon's POE within the thirty (30)-day review period proscribed by the Outer Continental Shelf Lands Act, as amended, (OCSLA). Subsequently, on January 14, 1985, the state of Alaska after considering comments by Nunam Kitlusisti, the cities of St. Paul and Nome, and the Bering Straits Coastal Resource Service Area Board concurred in Exxon's finding that the proposed activities are consistent with the Alaska Coastal Management Program (ACMP) which specifically includes consideration of subsistence uses.

5.

Upon receipt of MMS's approval of Exxon's POE, Exxon proceeded to implement its 1985 Navarin Basin drilling program. This program includes an initial well on Exxon's Redwood Prospect (OCS-Y 0559) with contingency plans to drill a second well on this prospect (OCS-Y 0592) depending on the results of the inital well. Exxon is

planning to commence its first well on or about June 4, 1985. To accomplish this drilling program, Exxon has had to commit to contracts for, among other things, the construction of a supply base on St. Paul Island, a support barge, helicopters, supply boats, and a drilling vessel. Exxon estimates that if its 1985 Navarin drilling program is enjoined by the Court, it will cost Exxon approximately $20,450,000 as of April 29, 1985, and that these costs will continue to escalate until June 4, 1985 when Exxon will be obligated to pay a total of approximately $23,250,000 in either cancellation or operating charges even though Exxon is precluded from commencing its operations. In the event, Exxon's 1985 drilling operations are delayed rather than cancelled, it will still incur operating charges of approximately $123,000 per day of delay. Any such delay also increases the possibility that Exxon's drilling program will be conducted during inclement weather and that the cost of this drilling program will dramatically escalate. In addition to Exxon's own drilling program, we are also negotiating to participate in up to three additional 1985 Navarin Basin wells to be drilled and operated by two other oil companies. Exxon assumes these other companies will incur similar cancellation or operating charges if their 1985 Navarin Basin drilling programs are cancelled or delayed as a result of the injunction sought by the Village of Gambell and Nunam Kitlusisti.

6.

Exxon is also planning to conduct site clearance activities over three Navarin Basin geologic prospects (roughly 32 lease blocks) during the summer of 1985. Exxon anticipates that these shallow seismic activities will commence in June. Exxon is currently obligated to pay its seismic contractor's mobilization and demobilization costs

($220,000) plus a minimum contract payment equal to sixty (60) days of operations (approximately $1,133,000) for a total minimum contract cost of about $1,353,000.[1]

7.

In addition to these cancellation or operating charges, Exxon and the other oil companies planning to drill in the Navarin Basin in 1985 will effectively be deprived of a year of their ten-year oil and gas leases. Equally important, the cancellation of these 1985 Navarin Basin drilling programs will impede the national interest in the expeditious exploration of a very prospective frontier oil and gas basin.

8.

Exxon has received, to date, all of the state and federal approvals required to commence its 1985 drilling program with the exception of the final permit to drill. Exxon submitted its application for this permit to drill on March 26, 1985. Exxon will be submitting supplementary materials requested by the MMS in the next few days. Once these materials are received, it is my understanding that any delay in the issuance of this permit will be due solely to this suit.

For all of the above reasons and since any delay caused by issuance of a preliminary injunction will result in enormous and irreparable damage both to Exxon and the na-

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[1] Exxon is also planning to conduct a deep seismic survey in the Navarin Basin in preparation for OCS Sale 107, which is scheduled for September 1986. This deep seismic survey is not related to Exxon's current exploration of its Sale 83 tracts.

tional interest, Exxon should be allowed to proceed, as scheduled and without delay, with its 1985 exploration drilling program for its Sale 83—Navarin Basin leases.

/s/ EARL D. STOUT,
Earl D. Stout, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME THIS 8TH DAY OF MAY 1985, AT HOUSTON, HARRIS COUNTY, TEXAS.

/s/ CHARLES RAYMOND LEMAY
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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Case No. A85-201 Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

AMOCO PRODUCTION COMPANY, ET AL., INTERVENOR-DEFENDANTS.

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**AFFIDAVIT OF DANA B. GRANNELL**
**EXHIBIT B**

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**AFFIDAVIT OF DANA B. GRANNELL**

State of Alaska ) ss.
Third Judicial District )

Dana B. Grannell, being first duly sworn, deposes and states to the best of his knowledge and belief that:

1. I am the South Alaska Regional Exploration Manager and acting Executive Vice President for Exploration Operations, ARCO Alaska, Inc. (ARCO). I am responsible for ARCO exploration decisions in Alaska and supervise exploration activities both onshore and offshore Alaska. Consequently, I am familiar with all of ARCO's activities relative to the Navarin Basin OCS Lease Sale 83 (Lease Sale 83) conducted on April 17, 1984.

2. ARCO acquired all or part of thirty (30) lease tracts at Lease Sale 83 at a cost to ARCO in excess of $61,600,000 (including first year rentals). Geological and geophysical costs incurred in preparation for the Sale were in excess of $17,000,000. These costs include seismic work done in the Basin and ARCO's share of a COST well drilled in the Lease Sale 83 area which was operated by ARCO.

3. During the summer of 1984 ARCO incurred additional expenses in performing site clearance work for two of its drilling prospects in the Lease Sale 83 area. This activity is in the nature of seismic work and represented an expenditure of just over $600,000. Such site clearance is a necessary prerequisite to drilling.

4. The lease purchase and associated activities described above represent an investment in excess of $79,000,000 in the Navarin Basin and includes considerable seismic and drilling experience in the area. As a Navarin operator, ARCO has successfully conducted several types of exploration activities, all of which were brought to conclusion without any indication of environmental, economic or other adverse impact to anyone or any resource. To the best of my knowledge, ARCO has never received a complaint of nor any direct evidence of any adverse effects occasioned by its exploration activities in the Navarin Basin.

5. During the coming summer, ARCO intends to continue its exploration effort in the Lease Sale 83 area. ARCO, as operator for a group of eight companies, is proceeding with plans to drill an exploration well on Block 637, Official Projection Diagram NP1-7. Because of the extreme remoteness of the lease tracts in the Navarin Basin, planning efforts for this well began early. The need to develop extensive logistical support, including the use of specialized transport such as long range helicopters and construction of a remote operations base has dictated that

certain commitments be made as early as last fall. In November 1984 and in January 1985 ARCO committed to contracts for helicopter support and the construction of an aviation support base on St. Paul Island. To date, those decisions represent a sunk cost of almost $2,000,000. Another $300,000 has been spent in the acquisition of permits, telecommunications, wellheads and drilling equipment. These costs would not be recoverable in the event drilling could not proceed.

6. As is the case with the other support requirements, negotiations for the use of a suitable offshore drilling rig commenced last December. Drill rig costs represent a major portion of the total cost of ARCO's well. After several months of effort, ARCO entered into a contract for a drill rig which is currently drilling a well offshore California. ARCO's Navarin plans are to a certain extent tied to the completion of the California well but it is anticipated that well will be completed this month. Upon completion, plans call for immediate mobilization of the drill rig from California to ARCO's Navarin site. Because of the expense of mobilization and the degree of availability of these specialized drill rigs, there is a penalty for termination of the drilling contract. Given the present time estimates and mobilization requirements, if ARCO were prevented at this time from drilling its Navarin well, a termination penalty would be incurred. This penalty could be as high as $1.8 million.

7. ARCO is otherwise fully prepared to proceed with its well. All applicable permits have been acquired or are in final processing. These include authorization to discharge under the National Pollutant Discharge Elimination System and ARCO's Application for Permit to Drill (APD) which is expected to be received shortly. ARCO's Plan of Exploration (POE) was approved by the Minerals Management Service on January 23, 1985 and the consistency determination required by the Alaska Coastal Management Program was received on March 28,

1985. The consistency determination process afforded the local Coastal Management planning agency, Cenaliulriit, the opportunity to review, comment and to make recommendations on ARCO's plan. Only after satisfying the concerns of Cenaliulriit, specifically including issues related to subsistence matters, did the State of Alaska render its consistency determination. It should be noted that the Director of Cenaliulritt, Mr. Harold Sparck, is also the Director of Plaintiff, Nunam Kitlusisiti.

8. Should drilling be delayed, ARCO faces the loss of approximately $4 million in sunk costs. Due to the nature of the drill rig contract additional money must be committed shortly for other support services. The actual timing of these commitments is dependent on the mobilization of the drill rig from California but with the anticipated schedule these will need to be made prior to the end of this month. The cost of all commitments necessary for the well will escalate rapidly with the departure of the drill rig for Alaskan waters. Cancellation costs and associated damages will doubtless exceed significantly the level of the sunk costs described above.

9. ARCO's investment in the Lease Sale 83 area is enormous and any delay in drilling occasioned by issuance of an injunction would represent a devastating loss and irreparable damage to ARCO. Given the nature of frontier exploration and the present state of the oil and gas industry, a lost opportunity in 1985 could lead to a loss of the entire investment. ARCO should be allowed to proceed without delay with its planned Navarin drilling in 1985.

/s/ DANA B. GRANNELL

Dana B. Grannell

SUBSCRIBED TO AND SWORN BEFORE ME THIS 8TH DAY OF MAY 1985, AT ANCHORAGE, ALASKA.

/s/ BARBARA HURLEY

Notary Public in and for Alaska
My Commission Expires: 7/23/88

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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Case No. A85-201 Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

*v.*

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

AMOCO PRODUCTION COMPANY, ET AL., INTERVENOR-DEFENDANTS.

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**AFFIDAVIT OF R. J. CRISWELL**
**EXHIBIT C**

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**AFFIDAVIT OF R. J. CRISWELL**

R. J. CRISWELL, being duly sworn, deposes and states to the best of his knowledge, information, and belief as follows:

1. I am the Western Division Production Manager for Amoco Production Company (Amoco). In this capacity, I manage and direct all of Amoco's offshore exploratory drilling programs with respect to Alaska and the Pacific, including the area covered by OCS Lease Sale 83 (Navarin Basin) in the Bering Sea offshore the state of Alaska.

2. This affidavit describes Amoco's long-standing commitment and preparation activities for its scheduled exploratory drilling program during 1985 in the OCS Lease Sale 83 area. In addition, it discusses the irreparable

harms that could be incurred by Amoco and the public at large with the issuance of an injunction prohibiting the exploratory drilling program which has been in the planning stages for over a year and its imminent implementation.

**A. OCS SALE 83 (NAVARIN BASIN) AREA**

3. The Navarin Basin lies approximately 300 miles from St. Lawrence Island and 400 miles from the west coast of mainland Alaska in the Bering Sea. The exploratory wells planned for the 1985 drilling season will be located in some of the most remote U.S. OCS waters ever drilled for U.S. oil and gas exploration. Because of weather conditions, ice conditions and the remoteness of the Navarin Basin, the planning, logistics, and required investments for this exploratory operation are significant. In the Navarin Basin ice prohibits exploratory drilling for all but about 7 months a year, 25 knot winds are common in winter, and heavy fog is present during the summer months. Hostile sea conditions most of the year make operating in this area of the U.S. OCS expensive and very demanding.

**B. AMOCO'S LEASES IN OCS SALE 83 (NAVARIN BASIN) AREA**

4. The U.S. Department of the Interior (DOI) held OCS Sale 83 on April 17, 1984. At the sale Amoco, both individually and jointly with partners, submitted bids on 82 tracts offered for lease. DOI accepted the bids submitted with respect to 47 of the 82 tracts (14 of the 47 successful bids are located in a buffer zone created by DOI as a result of a boundary dispute between the U.S. and the U.S.S.R. These leases have yet to be awarded to Amoco pending final decision by DOI to accept and award the leases.) At the time the 33 non-buffer zone leases were accepted by DOI, Amoco paid the sum of $123,332,900

for lease bonuses. The sum of $45,171,266, represents bonuses which will be paid by Amoco for the remaining 14 buffer zone leases when DOI decides they can be accepted. Therefore, Amoco has committed the net total sum of $168,504,166 for bonuses when DOI ultimately accepts all Amoco leases in the Navarin Basin.

5. Prior to lease sale itself on April 17, 1984, Amoco spent several million dollars acquiring geophysical data, information and in the processing of such data for the Sale 83 area. The monies expended include data and information, but also professional evaluations, interpretations, computer time, drafting, research, management and supervision.

### C. AMOCO'S 1985 EXPLORATORY DRILLING PROGRAM FOR OCS SALE 83 (NAVARIN BASIN) AREA

6. Amoco's plans for the 1985 drilling season are to begin the mobilization of equipment starting mid-May 1985 and to spud its first well during the first week of June, 1985. Amoco anticipates drilling between three (3) and four (4) wells during 1985 and an additional 3 wells during 1986 in this area.

All of the required equipment and supplies for this operation has already been contracted for or committed to by Amoco. The following is a summary of the major equipment areas required for the operation. Amoco is contractually committed to this equipment which is currently scheduled to be in the Navarin Basin during early June, 1985. The dollar amounts reflect the minimum monetary obligation incurred by Amoco if an injunction was entered prohibiting activity and equipment has to be demobilized or returned without being used during the short drilling season.

A. *Drilling Rigs*—$10,500,000

Amoco will operate two semi-submersible drilling rigs during the 1985 drilling season, the Odeco Ocean Odyssey and the Sedco 708. Current plans are for both rigs to be mobilized to the Navarin during early June, 1985. The dollar amount indicated represents Amoco's financial commitment pursuant to the contracts if the rigs are not mobilized to the Navarin Basin.

B. *Marine Support*—$12,000,000

A fleet of vessels will be required to support the two Amoco operated drilling rigs. A 63,000 DWT bulkcarrier is being modified to function as an offshore warehouse (wareship) and will be mobilized to the Navarin Basin area by June 1. Diesel fuel and water have been loaded on a 47,000 DWT product tanker which is also enroute to the Navarin Basin area and is expected to arrive by June 1.

Four supply boats are either currently enroute to the Navarin Basin area or will soon be enroute from areas around the world. Two additional boats, which will stand-by near each rig, are currently being fitted with oil spill and rescue equipment in Dutch Harbor, Alaska. All vessels are either presently under contract or committed to by Amoco. The dollar amount shown reflects Amoco's financial responsibility in the event that the program is cancelled on or before June 1, 1985.

C. *Air Support*—$9,509,000

Two Boeing BV-234 Chinook helicopters are under contract to support industry drilling operations in the Navarin this drilling season. A helibase has also been constructed on St. Paul Island, which will be the origin for all helicopter flights to the drilling rigs. The dollar amount shown represents Amoco's financial responsibility for the helicopters in the event the program is cancelled before the helicopters are utilized.

D. *Materials*—$2,500,000

At this date all materials have been ordered for the 1985 drilling program. This dollar amount represents an assumed 20% restocking fee for approximately $12,300,000 worth of total materials which have been purchased. Since all materials will soon be enroute to the Navarin Basin area, shipping charges have been incurred, but have not been included in this amount.

E. *Other*—$500,000

Consultants have been hired, satellite communications systems have been leased and a significant amount of company manpower has already been committed to the 1985 drilling program.

*Total—$35,000,000*

This figure represents the amount of financial burden Amoco will bear in the event that the 1985 drilling program is cancelled on or before June 1. The amount will increase substantially after June 1, 1985, as we actually commence operations in the area.

Amoco, as operator for itself and other interest owners, expects to spend at least $75 million in the 1985 exploratory drilling program for the Navarin Basin. An extensive effort has been made by Amoco and other operators to ensure that the impact on the environment from the exploratory drilling in the Navarin will be mitigated.

7. The practical result of any delay from an injunction preventing exploratory activity during any portion of the 1985 drilling season, would be twofold. First, due to the relatively short drilling season, it could likely preclude any exploratory drilling activity during the 1985 drilling season, even if an injunction was entered for only a few months. Secondly, an injunction resulting in delay would

be financially significant to Amoco as virtually all equipment is standing by and ready to be mobilized in May, 1985, to commence drilling activity in June, 1985.

8. A complete prohibition of the 1985 exploratory drilling season would cost Amoco and its partners a minimum of $35,000,000; most, if not all, of this would be unrecoverable in this or subsequent years, as they are based on contractual terms for the 1985 drilling season *only*. It is most certainly too late to mobilize this specialized Navarin array of equipment for use in other areas of the world. With such a significant loss, Amoco's potential future commitment to exploration in this area may be drastically reduced.

### D. AMOCO'S SEISMIC ACTIVITY DURING 1985

9. Amoco will not conduct "shallow hazard" or "deep" seismic activity during the 1985 drilling season on the tracts leased in OCS Sale 83.

### E. OIL SPILL CONTINGENCY PLAN

Attached hereto as Exhibit "A" is a brief summary of Amoco's Navarin Basin Oil Spill Contingency Plan and Response Equipment Summary. The complete Oil Spill Contingency Plan is covered in a 286 page document prepared specifically for Amoco's operations in the Navarin Basin. It has been previously submitted to the Mineral's Management Service as part of the overall regulatory approval process.

### F. HARM TO THE NATION

10. The day when industry will be able to produce petroleum from the Sale 83 area recedes further into the future when exploratory drilling operations are delayed. Reserves located within the Sale 83 area are estimated by the Minerals Management Service to be in excess of 1.2

billion barrels of oil and 7.7 trillion cubic feet of natural gas (unrisked mean estimates). This compares to total U.S. proven Reserves, as of December 31, 1983, of 27.7 billion barrels of oil and 200 trillion cubic feet of natural gas. It should be apparent that the nation has a compelling interest in the expeditious development of these valuable energy resources.

/s/ R. J. CRISWELL
R. J. Criswell

STATE OF COLORADO )
CITY & COUNTY OF DENVER ) ss.

The foregoing instrument was acknowledged before me this 7th day of May, 1985, by R. J. CRISWELL.

WITNESS my hand and offical seal.

/s/ GERILYN MARI
Gerilyn Mari
*Notary Public*

My Commission expires:
August 27, 1986
1670 Broadway
Denver, CO 8020

**EXHIBIT A**

AMOCO PRODUCTION COMPANY
NAVARIN BASIN OCS SALE 83 AREA
SUMMARY OF OIL SPILL CONTINGENCY
PLAN AND RESPONSE EQUIPMENT

The Oil Spill Contingency Plan for Amoco Exploration Operations in the Central Bering Sea (OCS Lease Sale Area No. 83) is designed to assist Amoco personnel and contractors in responding rapidly and effectively to oil spills that may result from the exploration and fuel transfer operations on the drilling rigs and vessels operating within the area. Two drilling rigs will be operating simultaneously in the Navarin Basin and will be refueled and resupplied from a tanker and wareship. A total of four supply boats will be used to transfer the fuel and supplies to the drilling rigs. In addition, a standby vessel (picket boat) will be stationed full time at each drilling rig for use in the event of emergencies (e.g., oil spills, evacuation, etc.).

The Amoco Spill plan complies with regulations of the U.S. Minerals Management Service (MMS) for exploration and development of the Outer Continental Shelf (OCS), Part 251 of Title 30 of the Code of Federal Regulations effective June 16, 1983, which incorporates OCS orders by reference. The Amoco Oil Spill Contingency Plan contains the following:

a. Provisions to assure that full resource capability is known and can be committed during an oil spill, including the identification and inventory of applicable equipment, materials, and supplies which are available locally and regionally, both committed and uncommitted, and the time required for deployment of the equipment.

b. Provisions for various degrees of response effort depending on the severity of the spill.
c. Provision for identifying and protecting areas of special biological sensitivity.
d. Establishment of procedures for the purpose of early detection and timely notification of an oil spill.
e. Provisions for well-defined and specific actions to be taken after discovery and notification of an oil spill, including:
   (1) Specification of an oil spill response operating team consisting of trained, prepared, and available operating personnel.
   (2) Predesignation of an oil spill response coordinator who is charged with the responsibility of and delegated commensurate authority of directing and coordinating response operations.
   (3) A preplanned location for an oil spill response operations center and a reliable communications system for directing the coordinated overall response operations.

Amoco's spill plan considers spill frequency and probable spill trajectories, includes the use of state-of-the-art equipment, and provides an on-site trained team for spill response, as well as a major spill response team of experts in their respective fields for complete and efficient spill cleanup.

Amoco has invested approximately $50,000 in the development of the Oil Spill Contingency Plan and has also contracted for development of a $50,000 Navarin Basin Oil Spill Training Program specific to the 1985 drilling program. Actual drills will be conducted by Amoco, and the boat and rig contractor personnel, with leased equipment dedicated to our drilling program. Leased equipment costs are estimated at $500,000 for the 6 month

program. Additional spill response equipment valued at approximately $500,000 is warehoused at Dutch Harbor. This equipment is owned by an industry cooperative, Alaska Clean Seas, of which Amoco is a member. This oil spill cleanup equipment is also available for Amoco's use in the event of a major oil spill.

**AFFIDAVIT OF JOSEPH G. JORGENSEN**

RE: PEOPLE OF GAMBELL

*v.*

HODEL (9TH CIR. NO. 85-3877)

I, Joseph G. Jorgensen, am a professor of comparative culture and social science at the University of California, Irvine. I earned my Ph.D. degree in anthropology and linguistics at Indiana University in 1964 and subsequently held positions at Antioch College, the University of Oregon, and the University of Michigan. At the Universities of Oregon, Michigan, and California I have been responsible for the field methodology and statistics training of all graduate students within my departments, and for teaching the substantive and theoretical courses dealing with American Indians and Eskimos, past and present. My current rank is Professor, Step VII. I have directed more than 25 Ph.D. dissertations based on field research among American Indian and Eskimo societies.

Before entering graduate school in anthropology I was employed for two years in several different capacities by the Uintah and Ouray Ute Indian Tribe of eastern Utah. I conducted field research on contemporary Ute economics, social organization, political organization, and religious movements while a graduate student, and wrote my dissertation on Ute history and modern culture, demonstrating the political and economic causes of changes to reservation Ute life. Since completion of the dissertation over two decades ago I have conducted field research among three Ute societies, two Shoshone societies, the Crow Indians, the Soboba Indians, Unalakleet Eskimos, Gambell Eskimos, Canadian Arctic Eskimos, and briefly with several other Eskimo societies, Aleutian societies, American Indian societies, and rural American Anglo and Chicano societies. A large portion of my most recent field

research, particularly that in which I have engaged during the past decade, has focused on the consequences to western American Indians from energy extraction and production projects conducted on their reservations, or near to them (see Jorgensen et al 1978, Jorgensen ed. 1984). My research publications include a book on a religious movement among the Utes and Shoshones and the factors which provoked and sustain it (1972) (the book received the C. Wright Mills Award for 1973 and a Pulitizer nomination), a book on the comparative analysis of Salishan language, environment, and culture (1969), and a book comparing the environments, languages, and cultures of 172 western American Indian societies (1980).

I am a John Simon Guggenheim Fellow (1975), a member of the Executive Board of Directors of the Human Relations Area Files, Inc. (Yale), a former Director (Dean) of the Program in Comparative Culture, a former Chair of the Department of Anthropology, University of Michigan, a member of the Executive Board of Directors of the Anthropology Resource Center (Boston), a former member of two committees of the National Academy of Sciences (one dealing with soils, another with mining and reclamation, on both my expertise focused on social consequences to Indians from contemplated extraction programs), the recipient of several grants from the National Science Foundation, the National Institutes of Health, the Wenner-Gren Foundation, and the American Philosphical Society, an associate editor on several academic journals, and I delivered the Fort Lectures (1980), the M. Crawford Lectures (1980), and the Leigh Lecture at the Diamond Jubilee of the Study of Anthropology in Utah (1982). I was the architect and principal social science consultant to the multi-disciplinary, National Science Foundation-sponsored (RANN division) Lake Powell Research Project (1971-5), and the principal

social science consultant to the Northern Cheyenne Research Project (1975-8). Both of those projects addressed the question of the relations between Indian societies and the naturally-occuring resources on which, and among which they lived, and the social and cultural consequences to Indians in both places from energy developments.

In 1981 I was invited by the Minerals Management Service's Socio-Economic Studies Program (then the Bureau of Land Management) to assist a contractor (Louis Berger and Associates) to analyze the probable consequences to Eskimo villages if they were to become principal or secondary staging areas for oil drilling and pumping operations. The intention of the contractor and MMS was to use my knowledge of the consequences to American Indians from energy developments to assist in forecasting the consequences to Alaskan Native villages from various involvements with oil extraction and transportation. I conducted field research in Alaska and in the Canadian administrative and oil staging towns of Inuvik and Tuktoyuktuk during 1981 and prepared a set of scenarios, treated as postulates, that could forecast changes to subsistence, economic, political, social, and religious life in Alaska Native villages depending on their involvement with OCS oil operations.

Other research assignments among Eskimo villages followed. I orchestrated MMS's social indicators project, a study of four NANA (Northwest Alaska Native Association) and four APIA (Aleutian-Pribilof Island Association) villages in which we empirically developed a panel of 47 indicators (variables) that are sensitive to changes occuring in village life, including subsistence, economics, household-family organization, political organization, demography, and village institutions (Jorgensen, McCleary, and McNabb 1985). In 1982 I consulted MMS's socio-economic analysis and update of Norton Sound, and in that year I also assumed the role of principal investi-

gator in MMS's harvest disruption project. The project comprised three study areas, St. Lawrence Island, Norton Sound, and the Beaufort-Chukchi Sea. My associates and I focused our temporal and field research on the villages of Gambell and Savoonga (St. Lawrence Island), Unalakleet (Norton Sound, for which I also had principal field research responsibilities), and Wainwright (Chukchi Sea). This research was intended by MMS to answer questions heretofore unanswered about the amounts of naturally-occurring, renewable resources harvested and put to use annually by the residents of each village, and to demonstrate the relations among the harvests of naturally-occurring, renewable resources and Eskimo culture, particularly the economic, kinship, and religious organizations, and the values, that is, significant symbols, attached to naturally-occurring resources by villagers. Our research teams spent between six months and one year in the several villages, and follow-up trips to the villages continue to the present. Published research documents from the projects are available through MMS (Jorgensen and Maxwell 1984; Little and Robbins 1984; Luton 1985). I am currently finishing, under contract with MMS, a comparative analysis of the relations among naturally-occurring resources, subsistence, and culture for the three villages. In 1984 I was invited to testify at the Round Table Sessions of the Inuit Circumpolar Conference's hearings on the Alaska Native Claims Settlement Act. I delivered the discussion piece on consequences to Native Americans from Federal laws.

I was contacted by James A. Bamberger, Esq., Alaska Legal Services Corporation, to read the "Hold Harmless" agreement filed by the federal government and the oil companies re Gambell v. Hodel and respond as to whether that agreement has any substantive relation to the accurate definition of, valid empirical assessment of, and protec-

tion of the subsistence way of life of natives in Bering Sea and Norton Sound villages. Inasmuch as I have spent the better part of the past three years analyzing these exact questions in detail as they pertain to the villages of Unalakleet and Gambell (and Wainwright), I recognize the importance and the severity of the question.

The National Environmental Policy Act of 1969, as revised to 1978, requires that state-of-the-art analyses be applied to the abiotic, biotic, and social environment, and to the relations among them that may be significantly affected by an alteration to the enviroment planned by man. Our investigations of Gambell and Unalakleet sought to provide state-of-the-art analyses, that is, logically correct, empirically warranted analyses of the relations among environment, man, and culture in those Bering Sea-Norton Sound villages. Our data and analyses appear in the MMS publications referred to above. Neither the data nor the analysis which our research teams present support the invalid logic, *non sequitur*, and serious omissions in the "Hold Harmless" agreement which threaten native subsistence life, hence native culture, in the villages of Bering Sea-Norton Sound.

The "Hold Harmless" agreement poses a dangerous threat to the subsistence ways of life practiced by the residents of the Bering Sea, from Unalakleet on the east to Gambell on the West. The former gain their subsistence livelihood as well as their principal source of cash from salmon, herring, and roe-on-kelp. The latter gain their subsistence livelihood as well as their principal source of cash from walrus and walrus by-products. Natives in both communities and everywhere else in the Bering Sea region are closely articulated with sea mammals, and their relations to sea mammals are central to their relations with the environment and to their definitions of themselves as hunters, as Eskimos. Gambell natives, and their relatives

in the sister village of Savoonga, are organized into patriclans whose members share the bag and quarry from hunting, fishing, and collecting trips—resources moving from those who were successful to those who were not through explicit networks of kinspeople. Beyond the patriclans which link persons from several households within villages and between Savoonga and Gambell, resources are shared with the elderly and with friends as the exigencies of the moment dictate. To be a successful extractor, and to share the fruits of the endeavor are crucial to being an Eskimo in Gambell, Unalakleet, and all other native villages in which I have worked.

At Unalakleet persons and families are not organized into patriclans, but the equivalent is the large, bilateral extended family whose members reside in several households but who coalesce to hunt, fish, and collect naturally-occurring, renewable resources. Those resources are shared throughout the family and with affines (in-laws) in the village and beyond. The elderly residents of the village are always remembered and provided with food for their tables. In turn, the unfortunate hunter, even the unfortunate village can expect to receive resources from relatives of affines in distant villages when extracting ventures have been unsuccessful, or when weather, ice conditions, or other natural but irregular problems affect the availability and harvests of natural resources.

At Gambell and Unalakleet, indeed, all villages of the Bering Sea-Norton Sound region, harvests of naturally-occurring resources are unpredictable from season to season and year to year. The variability in quantity and quality of resources is so marked within and between seasons and from year to year that we began to focus our research on how natives in Gambell and Unalakleet adjusted to fluctuating resources. We sought to know how and when secondary, or unpreferred resources were sought, and when and why kinship or friendship networks

were invoked to receive or to give food. It was evident that "low" levels of disruptions to the harvests of naturally-occurring, renewable resources were ubiquitous, the norm. Everyday adjustments were made to these disruptions by eating non-preferred foods, or foods provided by family and friends from those families' stored supplies.

Disruptions to the harvests of naturally-occurring resources to an entire village is a much different issue from disruptions to the harvests of a family, even though one family's misfortune affects many other families. For example, weather and ice conditions can reduce resource availability below the levels of a previous year, and can also reduce the distribution of the resources, as well as the seasonal span in which they occur. They may restrict access to resources by impeding or preventing travel, and they may cause spoilage to food already harvested. Late spring ice break-up in Norton Sound and still later break-up of the Yukon negatively influences seal and bearded seal hunting for all Unalakleet, Shaktoolik, Golovin, and White Mountain hunters, whereas early spring break-up negatively influences the harvests of greens, birds, roe-on-kelp, and herring. Both early and late spring break-ups occur often enough so that they are regarded as normal conditions by villagers.

At Gambell early break-up, coupled with stormy weather, high seas, or dense fog, can severely influence harvests of whales and walrus. Both may migrate past the village during conditions when they cannot be hunted persistently and vigorously. If, moreover, there is no drift ice or pack ice onto which walrus and seals can haul-out, even these populations migrate beyond the reach of St. Lawrence Island hunters. Inasmuch as St. Lawrence Island hunters are much more dependent upon sea mammals than are the villagers of Norton Sound, and because St. Lawrence Islanders have many fewer secondary and tertiary resources which can be extracted when harvests of

their staples are interrupted, the subsistence problems for villagers in Gambell, and their sister village Savoonga, become dire so soon as harvests of sea mammals are interrupted for a single spring season. In such instances, as occurred at Savoonga in 1982, villagers share their preserved and stored foods, and lean heavily on patriclan assistance networks in Gambell and Nome. Patriclan leaders, exercising their authority, collected the sea mammals which had been bagged by their clansmen, and redistributed them, so that all clan members gained their share. It made no difference whether the clan leaders resided in Gambell, Savoonga, or even Nome. They collected and redistributed the animals harvested by Gambell hunters.

The 1982 subsistence year at Unalakleet was provident, yet the Yukon River villages experienced disastrous salmon catches because of extremely high run-off (carrying debris which destroyed or fouled nets, made it difficult to place nets, etc.). As a consequence, Unalakleet families in which members were married to persons from the Yukon River villages sent large quantities of food to their affines in those villages. Those resources, of course, were redistributed.

The preceding examples, although brief, demonstrate how Bering Sea-Norton Sound subsistence economies are organized, and in particular how sharing operates to move subsistence resources from successful hunters to unsuccessful ones. The patriclan organization of St. Lawrence Island is the basis of the subsistence economy, economic organization, and social organization, and instrumental in the political and religious organizations. The prestige that accrues to household and clan leaders is through successful leadership in the extraction of naturally-occurring resources, and through fair redistribution, that is centralized collection and subsequent sharing of those resources with persons in need. These relations extend outward to affines and friends. Moreover, the successful

whaling captains on St. Lawrence Island, themselves usually patriclan leaders or leaders of clan segments, are responsible for storing huge quantities of the bowhead whales that are landed each year. Those portions are then redistributed to all members of both St. Lawrence Island villages at the annual whale festival each summer. At Unalakleet, the chief difference from Gambell is that the principal subsistence economic, economic, and social units are extended bilateral families.

Hunting, sharing, knowing the conditions of the environment, coping with those conditions, and managing personal and village affairs in a communitarian fashion in which maintenance of the environment and subsistence resources are the uppermost concern is the precise reason for which the villagers of Gambell requested ownership of St. Lawrence Island. They sought ownership and control of the island, through a federal trust relationship if necessary, rather than monetary remuneration from the Alaska Native Claims Settlement Act fund and the threat of going public and losing control of their corporation in 1991. The fears of 1971 when ANCSA was enacted have not abated and the provision to go public in 1991 is the precise reason for which Gambell natives have sought to drop the city form of government and the village corporation, while investing political and economic decision making in an IRA government with expanded authority. Indeed, during my first visit to Gambell in 1982 I was asked by the elected and appointed officials of the city government, the IRA government, and the village corporation the advantages of transferring land ownership and all other economic and political powers to the IRA government (and to federal trusteeship). I consulted Monroe Price, Dean of the Cardozo School of Law, Yeshiva University, and David Case, Attorney with Ziontz, Pirtle, et al, about the availability of such a move and passed the opinions on to the village authorities.

Gambell natives recognize the threats to their culture from federal law, as well as from the vagaries of weather and ice. They also recognize the threats posed by oil drilling, extraction, and transportation to their island, the naturally-occurring resources on which their culture is based and which sustain their lives, and to their limited sovereignty.

Unalakleet natives are equally cognizant of the threat posed to them by the public stock sales provision in ANCSA, to the consequences from becoming a secondary transportation hub for Norton Sound as oil operations increase, and to the consequences to the naturally-occurring resources on which their subsistence economy and cash economy is based from oil operations, increased growth and competition for those resources, and from the vagaries of nature.

Given the rigors of the Bering Sea-Norton Sound environments and the close connections between the Eskimo cultures of those areas and the harvests of naturally-occurring, renewable resources, the "Hold Harmless" agreement appears to be an ignorant and obtuse document. It surely doesn't qualify as a protection of the Eskimo way of life.

My central concerns are with sections (3)(a) and (b). The first three paragraphs of (3)(a), (1, 2, 3), are acceptable inasmuch as they specify that significant restrictions on harvests of naturally-occurring subsistence resources can be caused by the reduction of availability through decline, through alteration of their distribution or their location, or through delimitation of access by subsistence harvesters (extractors). These are measurable criteria, applicable to all Bering Sea-Norton Sound villages. There follows, however, a *non sequitur* in which "significant restrictions" are defined. By the "Hold Harmless" agreement, "significant restrictions" do not fit with the empirical reality of Eskimo subsistence and culture in the Being Sea-Norton

Sound area, hence the definition is a *non sequitur.* According to the authors of the agreement, significant restrictions shall not include "slight effect(s)" as opposed to "larger or substantial effects" on subsistence resources. Inasmuch as neither "slight" nor "larger or substantial" effects is defined, neither has an empirical referrent, neither is measurable, neither can be monitored. The issue, however, is the maintenance of the Eskimo subsistence life style and all that that phrase portends.

Our research demonstrates that low harvest disruptions are the norm throughout the Bering Sea-Norton Sound area. We have defined "low" levels of disruption. We have also defined "medium" levels of disruption. For example, at Unalakleet disruptions to combinations of three predominant staples and secondary food sources (any combination) for two consecutive seasons that render those resources inaccessible, or that destroy them after they are acquired satisfy the definition of a medium level of disruption. At Gambell, disruptions to two marine mammal species, or one marine mammal species and three other species, or six species other than marine mammals which render them inaccessible for two seasons of the year constitute medium level disruptions. Those definitions can be fitted with empirical data, hence can be monitored.

It is not known what the "Hold Harmless" agreement means by "slight effect(s)," but I presume it means something greater than the harvest disruptions that are experienced as the norm. If so, slight effects are, in fact, dire effects. And what, possibly, is meant by "large or substantial effects?" We define "high" levels of disruption for Unalakleet as disruptions which render inaccessible combinations of four predominant staples and secondary food sources throughout a year. Inasmuch as twelve of the sixteen types of naturally occurring resources on which Unalakleet natives rely are dependent on the sea, a major and protracted disruption to Norton Sound affecting some combination of four key sea mammals (seal oil, in par-

ticular, is eaten with virtually all preserved foods throughout the year), and/or fish, and/or waterfowl would have severe consequences for native subsistence regardless of the availability of land mammals, inland birds, and plants, and might affect tertiary food sources as well (marine invertebrates, roe-on-kelp, less exploited sea mammals). Noise from drilling might affect local availability of sea mammals, as might movement of oil barges, whereas a major oil spill, in conjunction with heavy and persistent storms through a winter, spring, summer, and fall, could affect access to resources, access to the spill area (perhaps ice locked and moving), deposition of oil in the tidal kelp, spawning migrations of anadramous species, haul-out areas for sea mammals, freezing of sea mammals, freezing of water fowl, inaccessibility of food for diving birds, and migratory routes for beluga and walruses.

At Gambell, "high" levels of disruption are defined as extending the conditions of a medium level through one more season. Gambell, then, so quintessentially dependent on a few major sea mammal species, would experience high level disruptions and crippling consequences in three seasons, rather than a full year as we forecast the case to be in Unalakleet. Indeed, high level disruption can be achieved even sooner if the Pacific walrus or any of the whale species are disrupted in the spring, or the three major seal species are jointly disrupted in the fall and winter.

The definitions of significant restrictions in the "Hold Harmless" agreements are meaningless. Yet, the applications of "significant restrictions" even though they are undefined and empirically unwarranted, are potentially pernicious. It is stated in (3)(b) that consequences shall mean losses of subsistence food or other physical subsistence resources. This, of course, is invalid logic inasmuch as there is no difference between "significant restrictions" and "consequences." Moreover, if the "Hold

Harmless" agreement were put into effect, we learn that consequences shall not include claims for psychological, cultural, religious, emotional, or similar losses. The losses referred to would be severe: deprivation of power, status, esteem, would surely follow from protracted slight, large or substantial effects on subsistence resources, assuming that our definitions of medium and high level disruptions are used to measure those disruptions. A quick perusal of the social and religious movement research literature will confirm this claim (see, for example, Aberle 1966, Jorgensen 1972, Mooney 1896). Kinship organizations will be altered as leaders can no longer provide for their kinspeople, affines, friends, and the elderly. Out migration may be required by families. Compulsory relocation inevitably has serious emotional, psychological, and cultural consequences for the relocatee (see Scudder and Colson 1982 for a summary of the research literature). Political and economic factionalism often results. And powerlessness generates a host of responses, too numerous to cite here. Eskimo longing for space and place, for their subsistence life style and the cultural rules which inform it and, at the same time, are based upon it, will be a deep problem. Yet, these "claims" are summarily dismissed by definition, just as significant restrictions shall not include slight disruptions by definition. The "Hold Harmless" agreement, if implemented, will be a travesty for Bering Sea-Norton Sound Eskimos, not simply their subsistence life styles.

The mitigations for large or substantial effects on subsistence resources are callous and incommensurable with the loss of naturally occurring species. Whales are treated as brothers, thanked for their gentleness and generosity, and shared in a festival of thanksgiving. In their place, the "Hold Harmless" agreement would substitute beef. Had the authors of the agreement an aggregate ounce of wit they might have poked in the history of federal

government-Indian relations for a culturally appropriate model for the substitution of beef for a naturally occurring subsistence resource on which a native people traditionally subsisted. For instance, at Rosebud and other Dakota reservations in the early 1880s, soon after the American bison population had been reduced from millions to about 1,500, and during the period when Dakota were restricted to their shrivelling reservations, the Indian were provided with rations of beef to replace the wanton destruction of the bison and the restriction of Indians from the chase. Indian agents had the idea of herding the cattle, which arrived on the hoof, to nearby hills, where they would be stampeded toward mounted Indians armed with pistols and short rifles (Pancoast 1883). Perhaps the "Hold Harmless" agreement could specify that beef would arrive on the hoof, dressed out with water wings. They could be dumped in the Bering Sea and the Gambell patriclan task groups could give chase in their 16′ skiffs.

/s/ JOSEPH G. JORGENSEN
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Gillian Cannon, Notary Public

State of California )
County of Orange ) ss.

On June 17, 1985, before me the undersigned, a Notary Public for the State of California, personally appeared Joseph G. Jorgensen, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

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## AFFIDAVIT OF RONALD L. LITTLE

STATE OF ALASKA )
THIRD JUDICIAL DISTRICT ) ss.

Ronald L. Little, being first duly sworn, deposes and states that:

1. My name is Ronald L. Little, and I reside at 481 Spring Creek Road, Providence, Utah 84322. My educational experience includes a B.S. in Psychology from the University of Utah (1963) and a Ph.D. in Sociology from the University of Oregon (1970).

2. I am an Associate Professor of Sociology, and serve as Assistant Department Head and Director of the Institute for Social Science Research on Natural Resources, Utah State University. My academic specialties are Research Methods and Statistics, Philosophy of Science, Ethnic Group Relations, and Sociology of Natural Resources.

3. My experience with the subsistence communities of Gambell and Savoonga includes serving as Senior Scientist, 1981-1984, Harvest Disruptions Study, John Muir Institute, conducted for Minerals Management Service, Anchorage, Alaska; 1984-1985, continuing research and writing on St. Lawrence Island, partially funded by College of Humanities, Arts and Social Sciences, and Department of Sociology, Utah State University.

4. At the request of James Bamberger, attorney for appellants, I have examined and evaluated the likely consequences of the "Hold Harmless Agreement" for the Eskimo residents of St. Lawrence Island. The Agreement was submitted to this court by Amoco Production Company, ARCO Alaska, Inc., and Exxon Corporation, the U.S. Department of Justice and the U.S. Department of Interior.

5. Before assessing the consequences of the agreement, certain logical and/or linguistic problems with the Agreement must be discussed. The first problem encoun-

tered has to do with the definitions used to articulate the intended meaning of the phrase "significant restrictions." The first three definitions of "significant restrictions" contained in paragraph 3 imply that any reduction in resource populations (¶3(a) (1)), and alteration in resource distributions which leads to a reduction in resource availability (¶3(a)(2)), or any limitation of access by subsistence harvesters (¶3(a)(3)) constitutes a "significant restriction." However, the last sentence of that same paragraph states that " 'Significant restrictions upon subsistence uses' shall not include 'slight effect[s] as opposed to large or substantial effects.' " Insofar as this fourth definition follows the first three difinitions, it must be assumed that the meaning of this definition supersedes the meanings contained in the first three definitions and that significant restrictions are limited to "large or substantial effects."

6. Even if such an assumption is made, the definitional problem is not resolved, for nowhere in the document are (a) slight, (b) large or (c) substantial effects defined. Without specific rules for quantifying these three levels of effects, any determination or evaluation of significant restrictions upon subsistence resources is dependent upon the whim and fancy of the observer/evaluator. *Compare* R. Little and L. Robbins, *Effects of Renewable Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island,* Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) where we distinguished between low, medium and high level subsistence disruptions.

7. In addition to the absence of quantification rules for determining the levels of harvest restrictions, nowhere in the Agreement is the process for selecting an observer/evaluator specified, nor are the technical and/or professional qualifications of a person who is to be considered for such a position delineated.

8. Finally in this regard, the Agreement provides no mechanism or procedure for continued and regular monitoring of any significant restrictions upon subsistence uses. Without continuous scientific monitoring, any claims presented to the energy firms by Natives for relief under paragraph 5 of this Agreement become subject to dispute and could force St. Lawrence Islanders into more-or-less continuous litigation. Insofar as Island governments can ill-afford the financial burden of litigation, the Agreement places undue hardships upon all-too-scarce Island resources.

9. A second definitional problem is encountered with the definition of "consequences." As defined in paragraph 3(b) the term loses its traditional meaning: "Something that logically or naturally follows from an action." *The American Heritage Dictionary,* Second College Edition, Houghton Mifflin Company, (1982). In the Agreement consequence is transformed into "losses of subsistence foods." Agreement at ¶3(b). In essence, "consequence," as defined, becomes equivalent to "significant restrictions upon subsistence uses" and the first sentences of paragraphs 1 and 2 become non sequiturs.

10. Ignoring the logical and linquistic problems just discussed, paragraph 3(b) creates significant problems in any evaluation of the consequences (normal usage) of the Hold Harmless Agreement. As a result of the nominal definition introduced for the term consequences, paragraph 3(b) specifically excludes from consideration as "significant restrictions upon subsistence uses" all non-physical human ramifications. That is, any direct or indirect effects upon the culture or social structures of the St. Lawrence Island Native communities are considered by the Agreement to be irrelevant or trivial.

11. Furthermore, paragraph 5 states that any awards to Island residents as a result of subsistence harvest reductions will be paid in cash, rather than in kind. While at-

tempts have been made to place dollar values on subsistence resources (*see e.g.*, R. Wolfe, *Norton Sound/Yukon Delta Sociocultural Systems Baseline Analysis,* Alaska OCS Socioeconomic Studies Program, Technical Report No. 72 (October 1981)), such attempts are necessarily based upon assumptions unique to a capitalist economy, not necessarily upon scientific criterion. The Agreement thus reflects an extreme cultural bias, one that favors the ideological and economic structure of the dominant segment of American society. In a society such as that found on St. Lawrence Island, cash repayment for the loss of naturally recurring resource species will not be viewed by most residents as even a rough equivalence. From their point of view, it is impossible to conceive of such an equivalence. Money simply cannot replace the subsistence resource base. Money can ease the pain of physical hunger, but not cultural stress, or psychological pain. (In conversations this past week with Gambell residents a good deal of black humor was directed at the prospect of replacing the subsistence resource base with food stamps or MacDonald's restaurants. It was suggested that perhaps the food stamps could be made in the shape of walrus so that they would truly replace Native foods).

12. The Hold Harmless Agreement, while consistent with the prevailing worldview of contemporary American society, is at odds with the cultural preferences of Island Eskimos. From their perspective, it is impossible for them to be "Held Harmless." Even if the restrictive interpretation of the consequences of off-shore oil/gas activities is ignored, and it must not be ignored, the Agreement gives only the illusion of protecting Native interests. It is a unilateral declaration, not a bilateral agreement. It protects only the financial interests of the energy firms, protecting neither the subsistence economy nor the cultural interests of St. Lawrence Islanders.

13. The restrictions of paragraph 3(b) cannot, as already noted, be ignored. While the effects of hunger which would result from harvest disruptions must not be underestimated, neither can the cultural consequences of harvest disruptions be trivialized. Just as American society is organized around our economy, St. Lawrence Island society is organized around their subsistence economy. However, insofar as Native culture makes no meaningful distinctions between economic and other activities, disruptions to the subsistence collection system have consequences far beyond what might be observed in non-Native society. Whereas participants in the dominant society frequently compartmentalize their lives into work and play categories, frequently working only in order to purchase recreational time, the holistic worldview of these Yup'ik speakers provides for no such compartmentalization (*see generally* Little and Robbins (1984)). Work and play are integrated and occupational colleagues, and same-sex friends and relatives are, for the most part, the same people.

14. While these Yup'ik-speaking Eskimos organize their activities around hunting, gathering, processing and distributing subsistence resources, the patriclan provides the organizing principle. Patriclans are non-local kin groups in which descent is determined through the male line. Inmarrying females are incorporated into the patriclan, while giving up membership in the clans of their birth. The eldest member of the clan, male or female, assumes leadership of the patriclan and provides advice on a wide range of issues from marriages, the naming of children and dispute resolution, to the determination of hunting practices and major purchase of subsistence equipment. With few exceptions hunting, fishing and gathering crews are organized around clan affiliations. Segments of the patriclans work and play together with great frequency as subsistence crews. Most generally these subsistence crews are

comprised of brothers and their own sons and/or nephews, i.e. clan segments. Summer fishing and gathering crews also include wives, daughters and nieces.

15. Disruptions in the availability and/or harvest of subsistence resources would alter these social structures in significant ways. As used here social structures refer to patterned behaviors, that is, repetitive behaviors among and between individuals. To the extent that harvests are disrupted, so are the associated behaviors. In less extreme cases, even though hunting activities may increase as crews attempt to equal past harvests in the face of a reduced resource base, the sharing network which is extensive and includes all Native residents of both Gambell and Savoonga would be altered. With less to share, there would be less sharing. As the reduction in sharing continued there would be deterioration in the network (*see* R. Little, and L. Robbins, *The Yup'ik Eskimos of St. Lawrence Island, Alaska: A Social Impact Assessment of Proposed Energy Development,* Chapter 8 in P. Savatsky (ed.), Social Impact Assessment Series, Westview Press, Summer 1985, for a more complete discussion of this process).

16. The longer and/or more extreme the disruption, the more devastating the results. As subsistence activities produce less and less, cash and credit resources are utilized to purchase foods to replace subsistence foods. While non-Native foods are consumed on St. Lawrence Island, there is an obvious preference for Native foods. Even the eating patterns are different when non-Native foods are consumed. Sitting around a common food tray on the floor is a pattern reserved only for eating Native foods.

17. As the reasons for interacting with other members of subsistence crews decrease as a result of disruptions, so do the number of interactions. With the latter comes an erosion of the social system. Furthermore, as cash and credit reserves dwindle, decisions to hunt may become less numerous for both psychological and financial reasons.

Regarding the former, learning theory would lead us to predict that decreased hunting successes leads to fewer decisions to hunt. In regard to the latter, money for gas and other supplies may not be available. Ultimately, a choice must be made: to hunt or purchase food from local stores (assuming that such food is even available).

18. In the most extreme instance of harvest disruptions resulting from off-shore oil/gas activities in the Bering Sea, an extended and extreme disruption, there would be a breakdown of the entire social system. In such an event, a vital culture would be lost as subsistence activities ceased to be replaced by welfare payments or out-migration to the mainland. The creation of a healthy cash economy on the Island in the absence of a resource base is a most unlikely event.

19. Because of the potential severity of harvest disruptions, the extended consequences of off-shore oil/gas activities cannot be ignored. The social consequences of energy development in the Bering Sea are at least equal in importance to the simple and direct physical consequences. But, like the physical consequences, it is conceptually impossible to create a "Hold Harmless Agreement." How does one compensate a people for the loss of a social system or an entire culture?

20. The Agreement, as it now stands, protects only the energy firms, even if the focus of the agreement is restricted to the direct physical impacts of harvest disruptions. If the equally important social and cultural consequences of harvest disruptions are considered, the Agreement is totally inadequate to the task of protecting a Native people and a way of life, a way of life that has continued uninterrupted since at least the time of Christ. *See* Little and Robbins, (1984). For these reasons, it is my expert opinion that the "Hold Harmless Agreement" filed with this court is completely inadequate and does not protect the Native people of St. Lawrence Island from pos-

sible adverse consequences resulting from exploration of the leases in Norton Sound and the Navarin Basin. Nor, given the particularities of Native life in and around the Bering Sea, can I contemplate any agreement which could effectively protect these people from the adverse consequences of oil and gas activities.

/s/ RONALD L. LITTLE
Ronald L. Little

SUBSCRIBED AND SWORN TO before me this 14 day of June, 1985.

DONALD COOPER
Notary Public in and for the
State of Alaska
My commission expires: 4/13/88

# In the Supreme Court of the United States

No. 85-1239

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

*v.*

VILLAGE OF GAMBELL, ALASKA, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. This case is consolidated with 85-1406, *Donald P. Hodel, Secretary of the Interior, et al.* v. *Village of Gambell, et al.*, and a total of one hour is allotted for oral argument.

# In the Supreme Court of the United States

No. 85-1406

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

VILLAGE OF GAMBELL, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. This case is consolidated with 85-1239, *Amoco Production Company, et al.* v. *Village of Gambell, Alaska, et al.*, and a total of one hour is allotted for oral argument.

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No. 85-1239

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States of Appeals for the Ninth Circuit**

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## BRIEF FOR PETITIONERS

---

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## QUESTIONS PRESENTED

1. Whether the lower court erred in holding that Outer Continental Shelf (OCS) leasing is subject to the restrictions of Section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a), when that statute applies only to lands "situated in Alaska" as to which the United States asserts "title"?

2. Assuming *arguendo* that ANILCA applies to the OCS, whether the lower court erred in holding that the Department of the Interior must comply at the leasing stage of an OCS project with Section 810(a)(1)-(3), which applies only to leases or permits that "would significantly restrict subsistence uses," when the Department properly concluded both that OCS leasing "would not" cause such restrictions and that it must comply with that section at later stages of the project if the issuance of any permits would cause such restrictions?

3. Whether the Ninth Circuit's decision that ANILCA applies to OCS leasing should be retroactively applied to enjoin operations on OCS lands leased before the date of that decision, when its ruling that the OCS is "situated in Alaska" was not foreshadowed by the language of the statute or by prior administrative or judicial rulings, when such retroactive application of ANILCA is not necessary to further the statute's purposes, and when it could result in the disruption of more than $4 billion of OCS investments?

4. Whether the lower court erred by holding that plaintiffs were entitled to an injunction, even though the district court had properly determined that "the

balance of irreparable harm does not favor" them, because they established a probability of success on the merits and because this is not a "rare" or "unusual" case where the injunction would harm the environment or disrupt a limited class of long-run contracts?

## PARTIES TO THE PROCEEDINGS

The petitioners in No. 85-1239 are Amoco Production Company, ARCO Alaska, Inc., Exxon Corporation, Mobil Exploration & Producing Services, Inc., Shell Western E & P, Inc., Sohio Alaska Petroleum Company, Texaco, Inc., and Union Oil Company of California.* The petitioners in No. 85-1406 are Donald P. Hodel, Secretary of the Interior, and the United States Department of the Interior. The respondents are People of the Village of Gambell, People of the Village of Stebbins and Nunam Kitlutsisti.

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* These petitioners' parent companies, subsidiaries and affiliates are identified in Appendix E (A64) to the petition.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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**No. 85-1239**

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AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

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**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Ninth Circuit**

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## BRIEF FOR PETITIONERS

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## OPINIONS BELOW

Two opinions of the United States Court of Appeals for the Ninth Circuit are directly relevant to this case: *Village of Gambell* v. *Clark*, 746 F.2d 572 (9th Cir. 1984) (hereafter *Gambell I*), reprinted in Appendix A to the petition for certiorari (A1), and *Village of Gambell* v. *Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*), reprinted in Appendix B (A23). The unreported opinion of the United States District Court for the District of Alaska in *Gambell II* is reprinted at Appendix C to the petition (A55). That court's opinion in *Gambell I* is reprinted at Appendix E to the petition of the federal defendants in No. 85-1406 (Fed. Petn. App. 68a).

## JURISDICTION

This Court's jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is based upon 28 U.S.C. § 1254(1). That court's judgment was entered on October 25, 1985. (A63). The petition for a writ of certiorari was filed on January 22, 1986, and was granted on June 2, 1986.

## STATUTES

Section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a), provides:

> "In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—
>
> "(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title;
>
> "(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and
>
> "(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with

> sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions."

Section 102(3) of ANILCA, 16 U.S.C. § 3102(3), defines "public lands" as used in Section 810(a) as

> "land[s] situated in Alaska which, after December 2, 1980, are Federal lands. . . ."

Section 102(2) of ANILCA, 16 U.S.C. § 3102(2), in turn, defines "Federal Lands" as

> "lands the title to which is in the United States after December 2, 1980."

## STATEMENT OF THE CASE

### A. The Origins of the Sale No. 57 Case

ANILCA was enacted in December 1980, and Outer Continental Shelf (OCS) leasing proceeded for more than two years without any claims that the statute applied to the OCS. However, on March 4, 1983, the Villages of Gambell and Stebbins filed a complaint against OCS Sale No. 57 (Norton Sound) alleging that the United States must comply with Section 810 of ANILCA prior to leasing OCS lands. (JA 15, 18). In the alternative, plaintiffs alleged that they held aboriginal hunting and fishing and trust rights to the OCS that would be infringed by OCS leasing. (JA 16, 18).

Plaintiffs moved for a preliminary injunction to prevent the sale. Their motion was denied by the district court, as was their motion to the Ninth Circuit for an emergency injunction pending appeal. Accordingly, Sale No. 57 took

place as scheduled on March 15, 1983. Fifty-nine tracts were leased for more than $300 million.

On April 11, 1983, the district court entered summary judgment for defendants. It found that plaintiffs' claims of aboriginal title to the OCS were inconsistent with paramount United States jurisdiction and control of the OCS. (Fed. Petn. App. 69a). The district court also found that the leasing of OCS minerals was not subject to Section 810 of ANILCA because OCS lands are not "situated in Alaska" and thus are not among the "public lands" to which the section applies. (Fed. Petn. App. 68a).

**B. The Ninth Circuit's Ruling in *Gambell I***

On November 2, 1984, the Ninth Circuit affirmed the district court's rejection of plaintiffs' aboriginal title and trust claims. *Gambell I*, 746 F.2d at 573 (A3). Unlike the district court, however, the court of appeals did not rest its decision on the paramountcy doctrine. Instead, the Ninth Circuit "assum[ed] rather than decid[ed] that [plaintiffs] had an aboriginal right to hunt and fish in the waters of Norton Sound." 746 F.2d at 573 n.1 (A3). After making this assumption, the court went on to hold that plaintiffs' "rights were extinguished by the [Alaska Native] Claims Settlement Act," Section 4(b), 43 U.S.C. § 1603(b) (ANCSA). 746 F.2d at 573 n.1 (A3).

In so ruling, the Ninth Circuit construed the phrase "in Alaska" as used in Section 4(b) of ANCSA as extending to the OCS. 746 F.2d at 575 (A6). Then, reasoning that ANCSA and ANILCA should be construed *in pari materia*, the Ninth Circuit held that the OCS must also be "situated in Alaska" for purposes of ANILCA. 746 F.2d at 579 (A14).

The court of appeals remanded the ANILCA issue to the district court to determine whether Interior had "complied with the requirements of . . . section [810], albeit acting under other statutes," such as the National Envi-

ronmental Policy Act, 42 U.S.C. § 4321 (NEPA). 746 F.2d at 582 (A21). The court also directed the district court to determine, in the event that there had not been such compliance, whether "the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810. . . ." *Id.*[1]

**C. Proceedings on Remand in *Gambell I***

After *Gambell I*, the Department of the Interior proceeded to comply with ANILCA as it affected Sale No. 57 by preparing, in the manner suggested by the court of appeals, a post-sale ANILCA evaluation. That evaluation addressed the three issues specified in the first tier of Section 810(a): effects on subsistence, availability of other lands, and other alternatives. The Department concluded that neither the leasing nor the exploration stages of Sale No. 57 would significantly restrict subsistence, but that, if reached (only a 13% possibility), the production stage could do so. (Fed. Petn. App. 106a). In the light of this conclusion, Interior determined that it need not at the leasing stage give the notice, hold the hearings or make the determinations specified in Section 810(a)(1)-(3), although it recognized that it might have to follow these procedures and make these determinations prior to the production stage.

On April 4, 1985, plaintiffs filed a motion in the district court for a preliminary injunction against proposed 1985 exploratory drilling operations in the Sale No. 57 area.[2] They argued that Interior could not comply with ANILCA

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[1] Neither side at that time sought certiorari with respect to these rulings. Certiorari was sought in a companion case, *Inupiat Community of the Arctic Slope* v. *United States*, 746 F.2d 570 (9th Cir. 1984), which raised solely the title issue. On October 7, 1985, the writ sought in that case was denied. 106 S. Ct. 68.

[2] Exploration had been conducted in the summer of 1984, prior to the Ninth Circuit's *Gambell I* decision, pursuant to Interior's approval of exploration plans. These plans allowed continued operations in 1985.

by virtue of its compliance with NEPA and other statutes and that full compliance with Section 810(a)(1)-(3) was required, at the leasing stage of an OCS project, if significant restrictions of subsistence might occur at the final production stage.

**D. OCS Sale No. 83 (Navarin Basin)**

OCS Sale No. 83 took place in April 1984 (prior to *Gambell I*) without any explicit ANILCA analysis and without any litigation challenge. The sale resulted in the leasing of 163 tracts in the Navarin Basin for more than $500 million. The Navarin Basin lies between 250 and 400 miles off the coast of Alaska. (JA 47).

After *Gambell I*, Interior prepared ANILCA evaluations to assess the applications by three companies to conduct exploratory drilling operations in the Navarin Basin in 1985. Those evaluations considered the issues specified in the first tier of Section 810(a) of ANILCA and concluded that no "significant restriction of subsistence uses is reasonably foreseeable from the proposed [exploration] in the Navarin Basin." (Fed. Petn. App. 115a). Accordingly, Interior granted the Navarin exploration permits in early 1985.

On April 25, 1985, the Village of Gambell and Nunam Kitlutsisti filed a complaint alleging that Sale No. 83 violated ANILCA (JA 20), and sought a preliminary injunction against Sale No. 83 exploration.

**E. Proceedings in the District Court on Plaintiffs' Preliminary Injunction Motions**

The Sale Nos. 57 and 83 cases were consolidated for the purpose of ruling upon plaintiffs' preliminary-injunction motions. Defendants responded to those motions in three ways:

First, they argued that there had been adequate consideration of all of the subsistence factors specified in the

first tier of Section 810(a) by virtue of Interior's compliance with NEPA and other statutes.

Second, defendants relied upon the post-*Gambell I* ANILCA evaluations which showed that neither leasing nor exploration would significantly restrict subsistence.

Third, defendants argued that exploration would not result in any irreparable injury to plaintiffs, but that an injunction would cause the companies that had made financial commitments for 1985 exploration to suffer immediate losses of about $70 million. (JA 25-55). Moreover, defendants pointed out that an injunction would interfere with OCS exploration in a manner contrary to the explicit policies of the OCS Lands Act, 43 U.S.C. § 1802(1).[3]

On May 23, 1985, the district court issued its opinion. (A55). The court recognized that

> "[t]he effect of the leases on subsistence and alternatives which would reduce or eliminate the impact on subsistence were discussed at some length in the respective EIS's for the lease sales. The availability of other lands was discussed in the context of the EIS for the Secretary's Five Year Leasing plan." (A57).

Nonetheless, the court found that Interior's compliance with NEPA and other statutes could not satisfy ANILCA because the Secretary "did not have the policy precepts of ANILCA in mind at the time of evaluation." (A57-58).

The court also held that if an ANILCA evaluation concluded that the production stage "may" cause significant subsistence restrictions, as was the case for Sale No. 57, it was necessary for the Department to comply, at the

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[3] The City of St. Paul, a Native community on the Pribilof Islands, filed an *amicus* brief supporting defendants. It argued that an injunction would frustrate the plans and financial commitments that it had made to serve as a staging point for OCS exploration.

leasing stage, with the notice, hearings and determinations requirements of Section 810(a)(1)-(3). (A61).

Thus, the trial court decided that plaintiffs were likely to prevail on the merits of their claims that both Sale Nos. 57 and 83 were conducted in violation of ANILCA. The district court did not, however, leap from this conclusion to issuance of the preliminary injunction sought by plaintiffs. Instead, it noted that Interior had properly found that leasing and exploration for both sales would not significantly restrict subsistence. The court also noted that there was ample opportunity, prior to the production stage of either sale, fully to comply with Section 810(a). Finally, the court found that the delay in exploration that would be caused by an injunction "may cause irreparable harm to this Nation's quest for new oil resources and energy independence." (A62-63). On this basis, the district court denied plaintiffs' motions for preliminary injunctions, holding that "the balance of irreparable harm does not favor the movants" and that "the public interest favors continued oil exploration. . . ." (A63).

**F. The Ninth Circuit's Ruling in *Gambell II***

Plaintiffs immediately moved for emergency relief in the Ninth Circuit to forestall 1985 exploration. Their motion was denied. (Fed. Petn. App. 70a). Thereafter, 1985 exploration commenced in both Norton Sound and Navarin Basin. That year's operations were concluded in the fall of 1985.

On October 25, 1985, the Ninth Circuit (Alarcon, Praegerson, C.JJ.; Dimmick, D.J., dissenting) reversed the district court and directed entry of "a preliminary injunction enjoining all activities in connection with Lease Sale 57 and Lease Sale 83. . . ." *Gambell II*, 774 F.2d at 1431 (A48). The court affirmed the district court's holdings both that Interior could not comply with ANILCA by virtue of its compliance with other statutes and that it was necessary for Interior, at the leasing stage, to comply with

Section 810(a)(1)-(3), if it determined that significant restrictions "may" occur at the final production stage of the project. *Gambell II*, 774 F.2d at 1420-21 (A31-34).

The court of appeals, however, disagreed with the district court's conclusion that it had the discretion to deny plaintiffs' motion for preliminary injunction. It ruled instead that the probable violation of an environmental statute entitles plaintiffs to an injunction except in "rare" or "unusual" cases where the injunction might itself "threaten the environment," 774 F.2d at 1424 (A40), or "interrupt[ ] the performance of long-term contracts," 774 F.2d at 1425 (A40). The court of appeals also rejected petitioners' arguments that its holding in *Gambell I* applying ANILCA to the OCS should only be applied prospectively.[4]

## SUMMARY OF ARGUMENT

I. The Ninth Circuit's application of Section 810(a) of ANILCA to the OCS ignores the plain meaning of the terms of the statute, the context in which they are used throughout ANILCA, and relevant legislative history.

A. Section 810(a) applies only to "public lands," which ANILCA defines as lands "situated in Alaska" as to which the United States asserts "title." By definition, the OCS commences at the exterior boundaries of Alaska and is thus not "situated in Alaska." Moreover, although the United States has asserted "title" on behalf of the States to that part of the continental shelf that underlies the

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[4] Judge Dimmick dissented on two grounds. First, she found that the majority's rule that, absent narrowly defined "unusual" circumstances, an injunction must issue when an environmental statute has been violated was inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). 774 F.2d at 1429 (A50). Second, she disagreed with the retroactive application of *Gambell I* to Sale No. 83, noting the $60 million in commitments that the companies had made for 1985 drilling in the Sale No. 83 region and the failure of plaintiffs to file suit prior to the making of those commitments. *Id.*

territorial sea, it has carefully refrained from asserting title to the OCS.

B. Congress' use of the term "public lands" throughout ANILCA shows that it did not intend that phrase to extend to the OCS. For example, when Congress asserted in 16 U.S.C. § 3101(d) that ANILCA provides for a "proper balance" for and "sufficient protection" of the "public lands," it could not have intended for that phrase to apply to the OCS, since the OCS Lands Act (OCSLA), 43 U.S.C. § 1331, not ANILCA, ensures such "balance" and "protection" for the OCS.

C. ANILCA's legislative history shows that it was the third and final chapter in a process for the apportionment of lands within Alaska between the State, the federal government, and Native Alaskans. The three major statutes which define that process—the Alaska Statehood Act, ANCSA, and ANILCA—all use the terms "public lands" or "public lands in Alaska" in contexts which can only pertain to lands within the State, not the OCS. Moreover, the specific legislative history of Section 810(a) shows that it was designed solely to ensure that all federally owned lands within the State's boundaries would be available for subsistence uses.

II. Even assuming *arguendo* that ANILCA applies to the OCS, the Ninth Circuit erred in holding that Interior must comply with the second-tier requirements of Section 810(a)(1)-(3), at the leasing stage of an OCS project, when OCS leasing "would not" significantly restrict subsistence, but when the production stage, should it occur, could cause such restrictions.

A. The second-tier requirements of the statute apply only when a specific disposition of public lands "would" significantly restrict subsistence. The Ninth Circuit ignored the plain meaning of the term "would" when it held that those requirements must be satisfied if a proposed dis-

position of public lands is unlikely to, but "may" ultimately cause significant restrictions of subsistence.

B. This Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), that OCS leasing does not "directly affect[]" the coastal zone under Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1), shows that OCS leasing would not significantly restrict subsistence. Under both the CZMA and ANILCA, leasing itself has no effects upon the interests protected by the statutes. Moreover, further review and analysis under both the CZMA and ANILCA are required prior to the authorization of any later stage which could have such impacts.

III. The Ninth Circuit's mandated injunction against OCS exploration was predicated upon its view that lease sales held prior to *Gambell I* can be retroactively invalidated. Such a retroactive application of *Gambell I* is contrary to this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), because *Gambell I* established a new principle of law that was not foreshadowed, because retroactive application of *Gambell I* will not further the operation of ANILCA, and because retroactive invalidation of pre-*Gambell I* OCS leases would cause grave inequities by, *inter alia*, disrupting more than $4 billion in investments in OCS leases.

IV. The "Ninth Circuit rule," relied upon below to reverse the district court for exercising discretion to deny plaintiffs a preliminary injunction after they had shown a probability of success on the merits, is contrary to this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

A. The court of appeals' "rule" commands an injunction in environmental litigation whenever plaintiffs have established a probability of success, except in "rare" or "unusual" cases in which an injunction would harm the environment or would disrupt the performance of long-

term contracts. *Weinberger*, by contrast, holds that, absent explicit indications in a statute to the contrary, courts retain broad discretion to deny injunctions notwithstanding a violation of law. ANILCA contains no such indications. The "Ninth Circuit rule" also violates the principles of *Weinberger* by awarding plaintiffs an injunction, even though, as here, they can show no irreparable injury and even though, as here, an injunction would result in severe harm to defendants and to the public interest.

B. The Ninth Circuit's application of its rule in this case led it to impose an injunction which does not alleviate any purported harm that plaintiffs suffered. Instead, the principal effect of the injunction is to impose punishment in contravention of well-established principles of equity.

## ARGUMENT

### I. SECTION 810 OF ANILCA DOES NOT APPLY TO THE OCS.

The Ninth Circuit has applied Section 810(a) of ANILCA to the OCS on the premise that it is "situated in Alaska." In plaintiffs' view, this application of the statute to the OCS "will concededly change the contours of some OCS lease sales; delay OCS leasing off Alaska. . . . [and] may prohibit some . . . lease sales." (Resp. Opp. to Petns. 17).

There is no basis for applying Section 810(a) to the OCS. The plain meaning of the statute's terms, the context in which those terms are used through ANILCA, and the legislative history all show that Congress did not intend to make the OCS subject to the restrictions of Section 810(a).

#### A. The Ninth Circuit's Construction of Section 810 of ANILCA Is Contrary to the Plain Meaning of Its Terms.

ANILCA deals with a multitude of Alaska land-use issues and spans 181 pages of the Statutes at Large, 94 Stat. 2371-2551. In these 181 pages there is but a single reference to the OCS, and it is for the purpose of ensuring

that ANILCA does not apply there: Section 1001(a), 16 U.S.C. § 3141(a), regarding a "Federal North Slope Lands Study," directs that it shall not encompass any "submerged lands on the [OCS]. . . ."[5]

The plain meaning of the terms of ANILCA, which show that it does not apply to the OCS, take on added significance when they are read against the absence of any contrary indications in the statute. Section 810 governs only the disposition of "public lands." 16 U.S.C. § 3120(a). ANILCA defines "public lands" as "land[s] situated in Alaska which . . . are Federal lands. . . ." *Id.* at § 3102(3). "Federal lands," in turn, "means lands the title to which is in the United States after December 2, 1980." *Id.* at § 3102(2).

Thus, to prevail here respondents must show that the OCS is "situated in Alaska" and that the United States asserts "title" to it. They cannot carry their burden on either issue.

**1. The OCS Is Not "Situated in Alaska."**

The OCS is not "situated in Alaska" in the common usage of those terms. Indeed, the Navarin Basin, the locus of Sale No. 83, lies more than 250 miles off the west coast of Alaska. Anyone asked to identify Alaska on a map would point to its land mass, not the vast oceans that surround it.

This common perception is anchored in the text of the Alaska Statehood Act, the OCSLA, and related legislation. Alaska was admitted to the Union on an "equal footing" with other States and was given "the same rights as . . . existing States" under the Submerged Lands Act of 1953,

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[5] Since Section 1001(a) applies to "Federal lands," not "public lands," which ANILCA defines as "Federal lands situated in Alaska," Congress out of an abundance of caution excluded OCS lands from its coverage. As we show below, pp. 15-19, *infra*, the OCS is not, in any event, "Federal land" because the United States has not asserted title to it.

43 U.S.C. § 1301.[6] Under that Act, Alaska has title and its boundaries extend to that part of the continental shelf lying within three miles of its coastline. 43 U.S.C. §§ 1301(a)(2), 1301(b). Under the OCSLA, the *Outer* Continental Shelf lies "seaward and outside" of the State boundaries established by the Submerged Lands Act. 43 U.S.C. § 1331(a). Clearly, therefore, under the plain meaning of the terms of ANILCA, the OCS is not "situated in Alaska."

The Ninth Circuit's contrary conclusion was based on the premise that Section 810 of ANILCA should be read as having the same scope as Section 4(b) of ANCSA, 43 U.S.C. § 1603(b). That section of ANCSA extinguished

> "all aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist. . . ."

After ruling that Section 4(b) extinguished Native claims of aboriginal title to the OCS, the lower court found "compelling" respondents' argument that Congress "intended the preference and procedural protections for subsistence uses mandated [in Section 810] . . . to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary." *Gambell I*, 746 F.2d 579-80 (A15). There are a number of flaws in the Ninth Circuit's reasoning.

First, defendants consistently denied and plaintiffs never proved that Native Americans had aboriginal title to any lands offshore Alaska. Having no record before it on this issue, the Ninth Circuit did not resolve this dispute. Instead, it merely "assum[ed] rather than decid[ed] that

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[6] Alaska Statehood Act, P.L. 85-508, Preamble, 72 Stat. 339 (1958); *Id.* at § 6(m), 72 Stat. at 343.

appellants had aboriginal title" to the OCS as the predicate for its reliance upon ANCSA Section 4(b) to dispose of plaintiffs' title claims. 746 F.2d at 573 n.1 (A3).

Second, Section 4(b) of ANCSA was not essential to extinguish aboriginal title to the OCS, even assuming it ever existed. The defendants in *Gambell I* had demonstrated and the district court had ruled that the federal government's "paramount" rights over the OCS, as recognized by pre-ANCSA decisions of this Court, precluded any claims of aboriginal title.[7] Defendants also argued that the OCSLA in 1953 extinguished any aboriginal titles. The Ninth Circuit did not discuss the paramountcy cases and specifically refused to consider whether the OCSLA vitiated plaintiffs' title claims. 746 F.2d at 573 n.1 (A3).

Third, Section 810 of ANILCA applies only to "public lands"—*i.e.*, lands "situated in Alaska" as to which the United States claims "title." The phrase "public lands" does not appear in Section 4(b) of ANCSA because Congress intended to extinguish all aboriginal title as to all lands, whether federally, State or privately owned. Patently, the scope of Section 810's protection of subsistence was not intended to be "co-extensive with the extinguishment of aboriginal rights" in the manner declared by the Ninth Circuit.

**2. Plaintiffs Cannot Show that the United States Asserts "Title" to the OCS.**

ANILCA and its legislative history are silent as whether the United States asserts title to the OCS. However, the House Merchant Marine and Fisheries Committee—one of the two committees of the House which reported out the bills that subsequently were enacted as ANILCA[8]—re-

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[7] *See, United States* v. *California*, 332 U.S. 9, 38-39 (1947); *United States* v. *Texas*, 339 U.S. 707, 719 (1950); *United States* v. *Louisiana*, 339 U.S. 699, 705-06 (1950).

[8] *See*, 20-21 & n. 14, *infra*.

cently declared that the United States does not assert title to the OCS:

> "The U.S. does not hold title to the OCS, nor is the OCS subject to 'sale or other disposition under the general laws.' As opposed to full dominion and control, the U.S. has claimed only limited sovereignty over the exploration and development of natural resources on and within the OCS. The U.S. in no way exercises title to or sovereignty over the area itself. Except for the resources-related claims or jurisdiction over the fisheries and mineral deposits of the OCS, the area is international and beyond U.S. control, as recently reiterated by the President's Exclusive Economic Zone Proclamation." H. Rep. No. 99-330, 99th Cong., 1st Sess. p. 591-92 (1985).

On this basis, the Committee opined that the OCS does not constitute "public lands" as that term has "enjoy[ed] two centuries of well-established meaning. . . ." *Id.* at 591. The House Merchant Marine and Fisheries Committee's view of the title issue is fully supported by the history of the United States' assertion of limited rights to the OCS.

In 1945, President Truman proclaimed that the United States

> "regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control . . . . The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected." 59 Stat. 884, 10 Fed. Reg. 12,303 (September 28, 1945).

In 1953, Congress implemented the Truman Proclamation when it passed the Submerged Lands Act, 43 U.S.C. § 1301, and the OCSLA. The former statute does vest in

the States "title" to "submerged lands," 43 U.S.C. § 1311(a), within the three-mile (or in two instances three-league) territorial sea, 43 U.S.C. § 1301(b). However, the OCSLA carefully avoided the language of title and proprietorship. Echoing the Truman Proclamation, it instead provides that "the subsoil and seabed of the [OCS] appertain to the United States and are subject to its jurisdiction, control, and power of disposition . . .." 43 U.S.C. § 1332(1).

Congress chose these divergent descriptions of the nature of state and federal jurisdiction over the shelf after receiving testimony from the State Department regarding the need to preserve the high-seas character of the waters above the OCS.[9] State testified that within the limits of the territorial seas—*i.e.*, submerged lands as defined by the Submerged Lands Act—the United States or a state could exercise full sovereignty over the seabed and superjacent waters, subject only to a right of "innocent passage" by vessels of other countries. In contrast, in areas beyond the territorial sea—*i.e.*, the OCS—the United States would not assert full sovereignty, for, if emulated by other nations, such sovereignty could interfere with freedom of navigation and overflight.[10]

Subsequently, the United States became a party to the Convention on the Continental Shelf adopted by the 1958 United Nations Conference on Law of the Sea. The Convention recognizes that coastal states "exercise[ ] over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources," but that

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[9] Submerged Lands: Hearings Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. 1051 (1953) (statement of Jack B. Tate, Deputy Legal Advisor, Department of State).

[10] *Id.* at 1070-71, 1079-80. *See also*, 43 U.S.C. § 1332(2), making it explicit that OCSLA "shall be construed in such a manner that the character of the waters above the [OCS] as high seas . . . shall not be affected."

these rights coexist with the rights of other nations to make use of the shelf—for example, by laying submarine cables and pipelines—and "do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters."[11]

The Supreme Court of Canada has recently distinguished the "sovereign rights" of the Convention from "the full sovereignty (saving only other nations' rights of innocent passage) which international law accords to coastal States over their territorial sea." *Hibernia Reference*, [1984] 1 S.C.R. 86, 96. In resolving a dispute between federal and provincial governments regarding ownership and control of OCS minerals, the court rejected arguments by Newfoundland that it had "proprietary" rights in the Continental Shelf:

> "We do not think Continental Shelf rights are proprietary in the ordinary sense. . . . [T]hey are 'sovereign rights' and they appertain to the coastal State as an extension of rights beyond where its ordinary sovereignty is exercised." *Id.* at 97.

The Canadian Supreme Court thus held that a coastal State "cannot 'own' the Continental Shelf as it can 'own' its land territory," and emphasized that "regulation by international law of the uses to which the Continental Shelf may be put is simply too extensive to construe the shelf to be part of the State's territory." *Id.* at 96.[12]

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[11] The Convention on the Continental Shelf, done April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311, Arts. 2(1) and 3, ratified March 24, 1961.

[12] The Canadian Supreme Court properly refused to follow a dictum of the International Court of Justice (ICJ) in the *North Sea Continental Shelf* cases, 1969 I.C.J. 3, 31, that international law attributes "title" to a coastal State with respect to its continental shelf. In the *North Sea* case, the Convention did not apply to resolution of the dispute at hand, since one of the parties had not ratified it. *Id.* at 26-27. Moreover, the dispute did not turn on the resolution of a title issue.

It is not necessary in this case for the Court to decide whether the United States could assert title to the OCS consistent with its obligations under international law. Instead, it suffices to show that both Congress and the Executive Branch have recognized the delicacy of this question. In these circumstances, it is inconceivable that when Congress enacted ANILCA it silently harbored the view that the United States holds title to the OCS.

**B. Numerous Provisions of ANILCA Show that Congress Did Not Intend "Public Lands" to Include the OCS.**

The conclusion that the OCS is not part of the "public lands" to which ANILCA applies is reinforced by the context in which the phrase is used throughout the Act. For example, one of the basic findings underlying the Act, Section 101(d), 16 U.S.C. § 3101(d), states that ANILCA

> "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values *on the public lands in Alaska*, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition *of the public lands in Alaska* pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those *public lands* necessary and appropriate for more intensive use and disposition. . . ."(emphasis added).

ANILCA deals exhaustively with issues concerning the federal government's management role as it relates to onshore lands in Alaska. But it is the OCSLA—*see, e.g.*, 43 U.S.C. §§ 1801-02, 1344(c), 1345(c)—not ANILCA, which provides for the "proper balance" involved in determining what OCS lands should be leased and how to protect environmental values as development proceeds. Plainly,

therefore, Congress limited the "sufficient protection" and "proper balance" for "the public lands in Alaska" referred to in Section 101(d) of ANILCA to onshore lands, not the OCS.

Other provisions of ANILCA lead to the same conclusion. Section 805(d), 16 U.S.C. § 3115(d), provides that the Secretary of the Interior shall be excused from his obligations to provide for local and regional participation in managing "public lands" for subsistence (*see, e.g.*, 16 U.S.C. §§ 3115(a)(1) & (a)(3)(C)), "if . . . the State enacts and implements laws of general applicability . . . for the taking of fish and wildlife *on the public lands* for subsistence uses" (emphasis added). Given the at-best indirect authority which Alaska has with respect to fish and wildlife on the OCS, this provision plainly contemplates that the term "public lands" is synonomous with on-shore lands.

Section 1008(a) of ANILCA, 16 U.S.C. § 3148, vividly illustrates that the term "federal lands of Alaska," which is similar to "public lands in Alaska," cannot extend to the OCS. That section provides that

> "[t]he Secretary shall establish, pursuant to the Mineral Leasing Act of 1920, as amended, an oil and gas leasing program *on the federal lands of Alaska* . . ., other than lands included in the National Petroleum Reserve—Alaska." (emphasis added).

The OCSLA, not the Mineral Leasing Act, governs oil and gas leasing on the OCS; no OCS leasing program can be developed under the Mineral Leasing Act. Instead, the Secretary is required by the OCSLA to develop a program for the leasing of OCS lands pursuant to the detailed provisions of that Act. 43 U.S.C. § 1344.[13]

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[13] The reference in other sections of ANILCA to leasing "public lands" or "federal lands" under the Mineral Leasing Act further demonstrates that Congress did not intend that the phrase "public lands in Alaska"

### C. The Legislative History of ANILCA Shows that Its Subsistence Provisions Do Not Apply to OCS Lands.

#### 1. The Background of ANILCA Show that the Term "Public Lands" Does Not Include the OCS.

The Ninth Circuit's construction of ANILCA as extending to the OCS ignores the role of the statute in the process of State and Native selection and federal withdrawal of lands pursuant to the 1958 Alaska Statehood Act and ANCSA. The portion of the House Report written by the Committee on Merchant Marine and Fisheries succinctly places ANILCA in context with these earlier enactments:

> "The Alaska National Interest Lands, commonly called the (d)(2) lands issue, represents the last stage of a 20 year effort to resolve the status of the 375 million acres under federal stewardship in the State of Alaska. The 1958 Statehood Act granted the State of Alaska the right to select 104 million acres for State ownership. In 1971, [ANCSA] resolved outstanding Native claims to many areas of the State by setting aside 44 million acres for selections by Native village and regional corporations. Additionally, these corporations will receive some $962 million.
>
> "In addition to resolving the Native claims to the State, [ANCSA] provided a study of other lands to be proposed as additions to the National Park, Wildlife Refuge, Forests, and Wild and Scenic River Systems. Section 17(d)(2) of the Act authorized the Secretary of the Interior to withdraw up to 80 million acres of land to be studied for possible addition to the four systems. Under that section, Congress had

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would include any part of the OCS. *See, e.g.*, Section 1010(a), 16 U.S.C. § 3150(a), referring to an assessment of the "oil, gas, and other mineral potential on all public lands in the State of Alaska"; Section 1201(f), 16 U.S.C. § 3181(f), withdrawing "all federal lands" within the Bristol Bay region "from leasing under the Mineral Leasing Act."

until December 1978 to act on the Secretarial withdrawal."[14]

ANILCA was Congress' response to its obligations in ANCSA to define the way in which the 80 million acres of so-called "d-2 lands"—*i.e.*, ANCSA § 17(d)(2), 43 U.S.C. § 1616(d)(2)—were to be placed into national parks, wildlife refuges, forests, and river systems.

The Statehood Act, ANCSA, and ANILCA all use the same phrase "public lands" or "public lands in Alaska" to deal with the related problems of State selection of lands under the Statehood Act, State and Native selections under ANCSA, and federal withdrawal and disposition of lands under ANCSA and ANILCA. In all three, it is clear that that phrase pertains exclusively to lands within the boundaries of the State and does not extend to the OCS.

**a. Alaska Statehood Act**

When admitted into the Union, Alaska was granted the right to select "from the public lands of the United States in Alaska" up to 102,550,000 acres. Alaska Statehood Act, P.L. 85-508, § 6(b), 72 Stat. at 340. Obviously, the rights of the State to select "from the public lands . . . in Alaska" did not extend to the OCS. To have given Alaska such rights when they were not enjoyed by other States would have been inconsistent with its "equal footing" admission. *See*, pp. 13-14, *supra*.

Moreover, under the OCSLA, the OCS "is a vital national resource reserve held by the federal government for the public. . . ." 43 U.S.C. § 1332(3). It is available for leasing to allow mineral development after the payment of bonuses, rentals and royalties to the United States. 43 U.S.C. §§ 1334(a), 1337. It is not available for conveyance

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[14] H. Rep. No. 96-97, Part II, 96th Cong., 1st Sess. 92 (1979). *See also, id.*, Part I, at 142; S. Rep. No. 96-413, 96th Cong., 1st Sess. 129 (1979).

to the States. Accordingly, the phrase "public lands of the United States in Alaska" as used in the Statehood Act did not extend to the OCS.

**b. ANCSA**

When ANCSA was passed in 1971, the State had only selected about 25% of the "public lands" to which it was entitled under the Statehood Act because, inter alia, of complications arising out of Native claims.[15] Thus, the vast majority of Alaska lands were still owned by the United States.

Section 17(d)(2) of ANCSA, 43 U.S.C. § 1616(d)(2), created a process for the United States to withdraw "public lands" that had not yet been identified for selection by the State to allow their incorporation into parks and the like, while making the balance of these lands available for selection by the State or by Native corporations in settlement of their claims.[16] It "directed [the Secretary] to withdraw" from appropriation or from selection by the State or by Native Corporations "up to, but not to exceed, eighty million acres of unreserved public lands in the State of Alaska . . . deem[ed] . . . suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic River Systems. . . ." 43 U.S.C. § 1616(d)(2)(A). "[A]ll unreserved public lands not withdrawn" were made "available for selection by the State and for appropriation under the public lands laws." *Id.* at §1616(d)(2)(B).

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[15] H. Rep. No. 96-97, Part I at 235.

[16] Under ANCSA "public lands" means

> "all Federal lands and interests therein located in Alaska except: (1) the smallest practical tract . . . enclosing land actually used in connection with the administration of any Federal installation and (2) land selections of the State of Alaska which have been patented or tentatively approved [for transfer to the State] under section 6(g) of the Alaska Statehood Act . . . or identified for selection by the State prior to January 17, 1969." 43 U.S.C. § 1602(e).

It is, accordingly, perfectly clear that the "d-2 lands" of ANCSA were exclusively federally owned lands located within the State's boundaries. Any broader reading of "public lands in the State of Alaska" as extending to the OCS would have had the impermissible effect of permitting the State to select OCS lands.

**c. ANILCA**

Section 17(d)(2)(C) of ANCSA directed the Secretary to advise the Congress over a two-year period as to the lands he had withdrawn pursuant to Section 17(d)(2)(A) and to submit recommendations with respect to the ultimate disposition of such lands. Congress then gave itself five years to act upon the Secretary's recommendations. 43 U.S.C. § 1616(d)(2)(D). ANCSA was enacted on December 18, 1971. Thus, Congress contemplated that it would be able to resolve the "d-2 lands" issue by December 1978.

Congress did not meet this deadline. However, in late 1978, to preserve the status quo, Secretary of the Interior Andrus withdrew 110 million acres of "public lands" in Alaska by virtue of his authority under the Federal Land Management and Policy Act (FLMPA), 43 U.S.C. § 1701.[17] At the same time, President Carter designated 56 million more acres of such lands as "Monuments" so as similarly to prevent them from being disposed of pending Congress' resolution of the d-2 issue.[18] ANILCA, as finally enacted in December 1980, superseded these Executive withdrawals and placed much of the lands affected by them within designated conservation units—*i.e.*, parks, refuges, forests and scenic river systems.[19]

Thus, ANILCA represents the culmination of a legislative process begun in 1958 and completed in 1980 that

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[17] H. Rep. No. 96-97, Part I at 142. FLPMA does not apply to the OCS. 43 U.S.C. § 1702(e)(1).

[18] H. Rep. No. 96-97, Part I at 142.

[19] *Id.* at 143.

addressed the complicated issue of apportioning lands in Alaska between the State, Native Alaskans, and the United States. The phrase "public lands" was used in all three statutes in a context that could only pertain to lands within the State's boundaries, not the OCS.

**2. The Subsistence Provisions of ANILCA Were Never Intended To Extend to the OCS.**

Plaintiffs have argued previously that Section 810, as well as the rest of Title VIII of ANILCA, can be read as having a different geographic scope than other parts of the statute, even though the phrase "public lands" as used there carries the same meaning that it does throughout the statute. There is simply no basis on the face of the statute for reading ANILCA's subsistence provisions more broadly than the rest of the statute. In any event, the specific legislative history of those provisions clearly shows that they were never intended to exceed the geographic scope of the rest of the statute.

The initial d-2 lands bills addressed subsistence by recognizing that it should be permitted within the conservation units ultimately created from the d-2 lands.[20] Thus, H.R. 39, 95th Cong., 1st Sess., the bill introduced on January 4, 1977, by Congressman Udall, Chairman of the Committee on Interior and Insular Affairs of the House of Representatives and principal architect of ANILCA, provided that

> "[T]he Secretary shall permit the continuation of such subsistence uses of the fish, wildlife and plant resources within the areas added to existing units or

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[20] *See, e.g.*, S. 1687, 94th Cong., 1st Sess. § 108 (1975), reproduced in Hearings on S. 1687, *et al.*, Before the Committee on Interior and Insular Affairs, U.S. Senate, 94th Cong., 1st Sess. 15-16 (1975). It appears that S. 1687 was drafted by the Department of the Interior in December 1973. *See, id.* at 130-31, 143.

> established by titles I, II, III and IV of this Act." H.R. 39, § 701(a).[21]

This approach had the support of the Administration. In the April 1977 hearings on H.R. 39, Secretary Andrus recommended that "subsistence uses be allowed on most of the D-2 proposals where these uses are important and traditional."[22]

This approach to the subsistence issue was not, however, fully acceptable to the Alaskan Natives. They had delegated responsibility for this issue to the Alaska Federation of Natives (AFN). Its president, Byron Mallott, testified in August 1977 that the AFN

> "believe[d] this legislation should confirm the subsistence rights of the Alaska Natives, not just to D-2 lands, but, as Congress plainly intended when it wrote its conference report [on ANCSA], to all Native subsistence uses on all Federal public lands."[23]

Mr. Mallott provided the Committee with a proposed subsistence provision for H.R. 39 to implement his proposal

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[21] *See* Hearings on H.R. 39, et al., Before the Subcommittee on General Oversight and Alaska Lands of the Committee on Interior and Insular Affairs. 95th Cong., 1st Sess., Serial 95-16, Part II, 20. (1977). (Hereafter "House Hearings").

[22] *Id.* at 148.

[23] House Hearings, Part XII at 53 (August 20, 1977). *See also, id.* at 52-61, 461-97.

The portion of the ANCSA Conference Report to which Mr. Mallott referred stated that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." H. Rep. No. 92-746, 92d Cong., 1st Sess. 37 (1977). The Conference Committee went on to state that the Secretary could protect subsistence by "withdraw[ing] appropriate lands and classify[ing] them . . . and . . . by closing appropriate lands to entry by non-residents when the subsistence resources of these lands are in short supply or otherwise threatened." *Id.*

that subsistence protection extend beyond the d-2 lands.[24] This AFN proposal recast the subsistence provisions of the bill into essentially the form which they assumed when enacted as Title VIII of ANILCA. Section 703 of the AFN proposal would have divided "public lands and Native lands located within the exterior boundaries of each of the 12 regional corporations established by ANCSA" into "separate subsistence management zones."[25] Section 705(c), which served as the model for Section 810(a) as ultimately adopted, then provided that:

> "In determining whether to withdraw, reserve, lease or otherwise permit the use, occupancy or disposition of public lands *in the Subsistence Management Zones*,"

the head of the relevant agencies should conduct an evaluation similar to that now required by Section 810(a).[26]

It is perfectly clear that the AFN proposed bill did not extend to the OCS, since it involved only the disposition of lands in "Subsistence Management Zones." Those zones were coterminous with "the exterior boundaries" of the 12 regional corporations established by ANCSA, and those corporations all lie within the boundaries of the State of Alaska. 43 U.S.C. § 1603(a).

H.R. 39 was thereafter amended to conform in all relevant respects to the AFN proposed bill. *See*, H.R. 39, Committee Print, October 28, 1977, § 704(a), establishing "Regional Subsistence Zones" within the boundaries of the 12 regional corporations and *id.*, § 714, dealing with disposition "of public lands in any regional zone." In April, 1978, the subsistence provisions of H.R. 39 were amended again to do away with the creation of "subsistence regional

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[24] House Hearings, Part XII at 489-97.

[25] *Id.* at 492.

[26] *Id.* at 497 (emphasis added).

zones," and the provisions regarding the disposition of lands were accordingly applied to all "public lands," defined as lands situated in Alaska to which the United States holds title.[27]

Mr. Mallott testified on this version of H.R. 39 and stressed that it incorporated all of the principles which had been embodied in the AFN's proposed bill, including "that any D2 subsistence management system apply to all federal lands in Alaska, not just D2 lands."[28] Neither he nor anyone else suggested that the deletion of the reference to subsistence zones, as it had been proposed by the AFN and as it had been reflected in the October 28, 1977 version of H.R. 39, in any way broadened the scope of the subsistence provisions to include OCS lands.

Thus, there is no basis in the legislative history of Section 810 for giving it a broader geographic scope than the rest of the statute. The subsistence provisions of ANILCA were designed solely to ensure that subsistence protection was not limited to the d-2 lands, but instead would pertain to all federally owned lands within Alaska's boundaries. That purpose was fully achieved when Title VIII of ANILCA was made applicable to all "public lands" "situated in Alaska" in the conventional sense of those terms. It was distorted beyond recognition by the Ninth Circuit's extention of Title VIII to the OCS.

**3. No Legislative History Supports the Extension of ANILCA to the OCS.**

The analysis of the legislative history relied upon by the Ninth Circuit to sustain its extension of ANILCA to the OCS is superficial and obviously flawed. First, the court noted several casual references in the ANILCA debates

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[27] Hearings Before the Subcommittee on Fisheries of the Committee on Merchant Marine and Fisheries, 95th Cong., 2nd Sess. 65 (§ 103(1)-(3)), 155 (§ 707) (1978).

[28] *Id.* at 462-63.

to the OCS as being "in Alaska," and thus concluded that the phrase was used in a "nontechnical" sense which could include the OCS. 746 F.2d at 575 (A5-6). It brushed aside the many contrary statements that ANILCA would not extend to the OCS on the ground that they pertained to portions of the statute other than Title VIII. 746 F.2d at 581-82 (A19-20).[29] However, the court failed to note that the references to the OCS as being "in Alaska" upon which it relied were also all made in debates regarding other titles. No statements were made in debates or elsewhere suggesting that the subsistence provisions of Title VIII should extend to the OCS. No member of Congress ever stated or implied that the OCS constituted "public lands" for purposes of Title VIII or any other provision of ANILCA.

The Ninth Circuit opined that the reference in the savings clause of ANILCA, 16 U.S.C. § 3125, to the Fishery Conservation and Management Act, 16 U.S.C. § 1801 (FCMA), evidenced Congress' intention to apply ANILCA offshore. However, that statute does not pertain solely to the OCS; it also applies to "anadromous species which spawn in United States rivers or estuaries." 16 U.S.C. § 1801(a)(1). *See also, id.* 1801(b)(1). Moreover, in certain

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[29] *See, e.g.*, statement of Representative Emery:

> "This legislation has nothing to do with the [OCS], and I do not think that there is any way we can legislate in this bill the policy that will be established on the [OCS]." 125 Cong. Rec. 11,170 (1979).

*See also*, statement of Representative Udall:

> "There are 203 million acres of sedimentary basins that have been identified offshore in Alaska.
>
> "Let me tell you how much is locked up by this bill. The answer is zero. Under other legislation [the 1978 OCSLA amendments] . . . we now have in place good [OCS] legislation. Plans are going forward and all the offshore lands in Alaska where the majority of the oil is to be found are left open by this bill." *Id.* at 11,128.

circumstances FCMA empowers the Secretary to "regulate the applicable fishery within the boundaries of such State. . .." *Id.* at § 1856(b)(1). Thus, the reference to the FCMA in the savings clause of ANILCA does not mean that the statute applies to the OCS.

Finally, the Ninth Circuit ruled that "the most compelling reason for resolving the ambiguous language of Title VIII in favor of [OCS] lands and waters is that Title VIII was adopted to benefit the Natives." 746 F.2d at 581 (A18). However, the Ninth Circuit failed to recognize that it could not expansively construe the phrase "public lands," as used in Title VIII of ANILCA, in isolation from the rest of the statute. Even if a principle of liberal construction should apply to those parts of Title VIII which are unique to it, such a principle cannot apply to terms of general applicability—like "public lands"—that are specifically defined by Title I of ANILCA and appear throughout the statute. In any event, even in cases where the principle of liberal construction does properly apply, it "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe*, 106 S. Ct. 2039, 2044 (1986). *See also*, cases cited *id.* at 2044 n.13.

**4. The 1978 Amendments to the OCSLA Demonstrate that Congress Did Not Silently Extend ANILCA to the OCS.**

Congress' consideration of ANILCA spanned almost the entire decade of the 1970s. At exactly the same time, Congress had under consideration extensive amendments to the OCSLA, which it adopted in 1978. Those amendments stressed the national need for accelerated development of OCS oil and gas resources,[30] articulated the specific responsibilities of the Department of the Interior

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[30] 43 U.S.C. §§ 1801(1)-(5), 1802(2).

to ensure that this vital national goal could be achieved in a manner that fully considers other competing values (including subsistence-related matters),[31] and insisted that leasing take place in a manner which reflects a proper balance between resource development and the avoidance of environmental harm.[32] Significantly, the 1978 OCSLA legislative history reveals that the OCS off Alaska was then believed to hold the potential for over 50% of all undiscovered OCS oil and gas,[33] and that Congress had clearly in mind creating a framework for OCS leasing that would protect the OCS and the Alaskan coast.[34]

The 1978 OCSLA amendments were the product of congressional committees composed of the same persons whose committees had principle responsibility for ANILCA.[35] Thus, the framers of ANILCA were well aware that the OCSLA provided a framework for the analysis of subsistence-related issues insofar as OCS lands were concerned. They were also aware of the Department of the Interior's responsibilities under NEPA to investigate fully

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[31] *See*, 43 U.S.C. § 1802(3), referring to the minimization of "risk of damage to the human, marine, and coastal environments," and *id.* at § (7), focusing upon the avoidance of conflicts with "the recovery of other resources such as fish and shellfish."

[32] *See*, 43 U.S.C. § 1344(a)(3) requiring a "balance" in designing an OCS leasing program; *id.* at § 1345(c) prescribing the same for OCS lease sales.

[33] H. Rep. No. 95-590, 95th Cong., 1st Sess. 71 (1977).

[34] *Id.* at 106.

[35] For example, Congressman Murphy was the chairman of the Ad Hoc House OCS Committee which reported the OCSLA amendments. *See, id.* at 218. Mr. Murphy was simultaneously chairman of the House Merchant Marine and Fisheries Committee, which had joint responsibility for reporting ANILCA. H. Rep. No. 96-97, Part II, 96th Cong., 1st Sess. (1979). Congressman Udall, chairman of the other House ANILCA committee, was also a member of the Ad Hoc OCS Committee. H. Rep. No. 95-590 at 288.

OCS-related impacts upon subsistence and alternatives that could avoid such impacts.[36]

Under these circumstances, if Congress had intended to impose additional statutory constraints on OCS activities by requiring compliance with the restrictions of Section 810 of ANILCA it surely would have said so. Congress's silence throughout the lengthy legislative history of ANILCA regarding its application to the OCS is therefore persuasive evidence that the statute was not intended to apply there.

## II. THE NINTH CIRCUIT ERRED IN REQUIRING COMPLIANCE WITH SECTION 810(a)(1)-(3) AT THE LEASING STAGE OF SALE NO. 57.

We have shown in Part I above that ANILCA does not apply to the OCS. If the Court agrees with this argument, it is not necessary for it to reach the issues discussed in Parts II and III of this brief. However, even assuming *arguendo* that the subsistence provisions of ANILCA do apply to the OCS, the Ninth Circuit misconstrued that statute by requiring Interior to comply, at the leasing stage of an OCS project, with Section 810(a)(1)-(3) merely because significant subsistence restrictions could possibly occur at the final production stage of the project.

In the ANILCA evaluation for Sale No. 57, the Department emphasized that "at present, no development and production plans have been proposed," so that "the discussion of the development & production stage is based on . . . hypothetical scenarios and oil-spill-risk analysis. . . ." (Fed. Petn. App. 84a). Nonetheless, it considered the three issues specified in the first tier of Section 810(a)—

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[36] In this case, the district court held, and the court of appeals did not disagree, that "the effect of the leases on subsistence and alternatives which would reduce or eliminate the impacts on subsistence were discussed at some length in the respective EIS's for the lease sale." (A57).

effects upon subsistence, the availability of other land and the alternatives—for each of the three stages of Sale No. 57.

Following this evaluation, Interior determined that the lease sale and associated preliminary activities "will not significantly restrict subsistence uses." (Fed. Petn. App. 106a). Exploration was found "not likely to significantly restrict subsistence uses." *Id.*. Finally, while noting that there was only a 13-14% possibility that the development/production stage would be reached, Interior found that it could significantly restrict subsistence in certain localities. *Id.*[37]

The ultimate finding made with respect to the leasing decision regarding Sale No. 57 was unequivocal: "[T]he leasing of tracts in Sale No. 57 will not significantly restrict subsistence uses." *Id.* at 81a. This finding was based upon the determination that leasing and the preliminary activities at that stage would not have such effects, that exploration was unlikely to do so, and that development/production was unlikely to occur.[38] Based upon this finding, the Department determined that it need not presently give the notice, hold the hearings, or make the determinations contemplated by Section 810(a)(1)-(3), although it recognized that, should development/production stage of the project be reached, it might be necessary to do so. *Id.* at 106a.

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[37] For the St. Lawrence Island and Nome/Cape Nome regions Interior found that development/production, should it occur, could have community-wide and measurable impacts upon several subsistence species for one or two villages over a period of one or two years. *Id.* at 95a, 98a. The Department regards such impacts as "significant."

[38] At no point did the lower courts take issue with these findings. Indeed, the district court relied upon them in exercising its discretion to deny plaintiffs' injunction motions, when it held that neither leasing nor exploration would significantly restrict subsistence uses.

### A. The Ninth Circuit's Holding that Interior Had Not Complied with ANILCA for Sale No. 57 Was Based upon a Distortion of the Terms of ANILCA.

The second-tier obligations recited in Section 810(a)(1)-(3) apply only when a proposed "lease" or "permit" "would significantly restrict subsistence." The plain meaning of the term "would" suggests a probability or likelihood. *See, INS* v. *Stevic*, 467 U.S. 407, 422 (1984), where the Court inferred from Congress' use of the word "would" that there must be a "likelihood" of the specified event and that it would not, therefore, be sufficient merely to find that the event "might" or "could" occur.

Had the Ninth Circuit applied the plain meaning of the term "would" in Section 810(a), it could not have held that Interior's decision to conduct Sale No. 57 "would significantly restrict subsistence." Plainly the decision to offer leases would not have such impacts. Moreover, that decision cannot be regarded as setting in motion a chain of events likely to have such impacts, since exploration is not likely to restrict subsistence significantly and since there is only a 13-14% likelihood of production.

Instead of giving plain meaning to the language of Section 810, the court of appeals held in *Gambell II* that the second-tier requirements of the statute must be complied with whenever a proposed disposition of public lands "may significantly restrict subsistence uses." 774 F.2d at 1422 (A34). Given the facts of this case, the court diluted the term "would" to mean "may" in the sense of any possibility of a future impact.[39]

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[39] Subsequently, the Ninth Circuit clarified that *Gambell II*'s transmutation of the word "would" into "may" requires leasing-stage compliance with the second tier of Section 810(a) when there is any risk or threat, even if "unlikely," of significant subsistence restrictions arising at the later stages of OCS projects. *Village of Akutan* v. *Hodel*, 792 F.2d 1376 (9th Cir. 1986).

**B. This Court's Decision in *Secretary of the Interior* v. *California* Establishes that a Decision To Proceed with OCS Leasing Does Not Constitute Action that "Would Significantly Restrict Subsistence."**

In *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), the issue before the Court was whether an OCS lease sale "directly affect[s]" the coastal zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1). Had the Court concluded that leasing did have such effects, Interior would have been required to make the lease sale "consistent" with a State's CZMA program.

The issue before the Court in this case is quite similar --whether the Secretary's decision to conduct a lease sale "would significantly restrict subsistence" within the meaning of Section 810(a) of ANILCA. If the leasing decision "would" have such consequences, the Secretary must comply with Section 810(a)(3) and make determinations comparable to those that would have been required under the CZMA to achieve consistency. This Court's decision in *Secretary of the Interior* that the offering of leases does not have "direct" effects on the coastal zone fully supports Interior's conclusion that the decision to offer Sale No. 57 leases does not entail consequences that "would" significantly restrict subsistence.[40]

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[40] *Secretary of the Interior* should be applied *a fortiori* to the facts of this case. The dissenting Justices stressed in that case that exploration and production were "the intended and most probable consequence[s]" of the leasing decision, 464 U.S. at 364, and that they were "the natural and expected consequence[s] of the original lease," *id.* at 373. Exploration following a lease sale is virtually inevitable, and in *Secretary of the Interior* it was conceded that exploration could have some effects upon the coastal zone. Here, by contrast, the significant restrictions of subsistence hypothesized by Interior all relate to the final production/development stage. While both government and industry hope, and in that sense intend, that this stage will be reached, it is neither the "most probable" nor the "expected" consequence of issuing leases.

The basis for the Court's holding in *Secretary of the Interior* that leasing does not "directly affect[]" the coastal zone was its recognition that "Congress ha[d] codified with great care," 464 U.S. at 336, "the distinction between a sale of a 'lease' and the issuance of a permit to 'explore for,' 'produce,' or 'develop' oil or gas" on the OCS. *Id.* at 335-36. After describing the three stages of an OCS project (as well as the preceding stage associated with preparation of a five-year leasing program), *id.* at 337-40, the Court concluded:

> "Congress has thus taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing development and production. Since 1978, the purchase of an OCS lease, standing alone, entails no right to explore for, develop, or produce oil and gas resources on the OCS." *Id.* at 340.

The Court noted that

> "The stated reason for this four-part division was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the later stages of OCS exploration and production." *Id.* at 341.

Accordingly, the Court held that the issuance of an OCS lease would not directly affect the coastal zone when coastal-zone impacts would not occur until Interior's authorization of later stages of the project.

The same reasoning leads to the conclusion that OCS Sale No. 57 "would not significantly restrict subsistence." As to both the CZMA and ANILCA, the leasing stage of the project, separately considered, will not have the impacts that trigger application of the relevant statute.[41] Also,

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[41] The dissent in *Secretary of the Interior* stated that the lower courts' findings in that case "indicate[d] [that] some of those [coastal zone]

for both CZMA and ANILCA, it is necessary to conduct a further analysis under the statute prior to approval of any subsequent stage of an OCS project that is likely to cause such an impact. If Section 810(a) applies to the OCS, it requires ANILCA evaluations prior to the approval of exploration or development/production plans, since the statute applies whenever an agency proposes "to . . . permit the use . . . of public lands." If those evaluations show that the next stage "would significantly restrict subsistence," the Department must comply with Section 810(a)(1)-(3) before issuing a permit. Compare CZMA § 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B).

Thus, the basic policy underlying the OCSLA -- to "separate" the development/production decision from an OCS leasing decision in order to avoid "premature litigation regarding effects that all agree will flow, if at all, only from the later stages," 464 U.S. at 341 -- which controls the application of the CZMA to the OCS process, similarly applies here.[42]

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impacts will occur almost immediately, prior to review under the OCSLA, and can never be reviewed adequately if they are not reviewed now." 464 U.S. at 363. As an example of such impacts, it noted the California CZMA agency's objection to the "lack of onshore facilities, land, and population that can accomodate oil development." *Id.* at 363 n.19. There are no comparable findings here, either by the lower courts or by any State or federal agency. The lower court's insistence that there be compliance now with the full requirements of Section 810(a)(1)-(3) turns exclusively upon its concern with subsistence restrictions that might arise at the final production stage.

[42] The Ninth Circuit dismissed *Secretary of the Interior* as irrelevant on the ground that it did not involve ANILCA. 774 F.2d at 1422 (A35). However, this Court's recognition that the OCS process was carefully designed to ensure that the issuance of leases does not have coastal-zone or other similar impacts is relevant to all environmental statutes as they apply to OCS leasing. Indeed, the Ninth Circuit in an earlier case heavily relied upon *Secretary of the Interior* in defining the way in which both the Endangered Species Act (ESA), 16 U.S.C. § 1531, and NEPA apply to the OCS. *Village of False Pass* v. *Clark*, 733 F.2d

## III. THE NINTH CIRCUIT'S DECISION IN *GAMBELL I* SHOULD NOT BE APPLIED RETROACTIVELY.

The only explanation provided by the Ninth Circuit for its injunction against exploration was that the two lease sales were not conducted in complete compliance with ANILCA. The lower court did not explain why this failing justified an injunction. However, its action seems to have been based on one of two alternative rationale: (1) that the sales were unlawful and all actions, such as exploration, taken in reliance upon the issuance of leases at the sales were similarly unlawful; or (2) that the sales might ultimately be declared unlawful after Interior performed additional ANILCA analyses.[43] Whatever the Ninth Circuit's rationale, it erred in premising its injunction upon a retroactive application of *Gambell I* that contemplates invalidation of OCS leases issued before that opinion.

Interior conducted seven OCS lease sales offshore Alaska between the enactment of ANILCA and the Ninth Circuit's

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605 (9th Cir. 1984).

The alternative ground for the lower court's refusal to follow *Secretary of the Interior*—that the purportedly more specific requirements of ANILCA override the allegedly more general ones of the OCSLA, 774 F.2d at 1422 (A35)—is equally misguided. ANILCA specifies the process to analyze and mitigate subsistence impacts; the OCSLA sets forth specific requirements regarding Department of the Interior approval of each of the stages of an OCS lease sale. It is illusory to ask which of the two statutes is more specific. Instead, the lower court should have searched, as this Court did in *Secretary of the Interior*, for an interpretation that gives full meaning to both.

[43] The dissent in *Gambell II* complained that the majority did not explain which of these two alternatives motivated its decision to mandate an injunction. 774 F.2d at 1431 (A53-54). However, it is clear that *Gambell II*'s injunction was based on one of them, rather than upon any purported flaws in the ANILCA analysis for the exploration plans themselves. As noted, p. 6, *supra*, Interior prepared explicit ANILCA evaluations for OCS Sale No. 83 exploration which concluded that it would not significantly restrict subsistence. Plaintiffs never challenged those evaluations, and the lower courts never suggested that they were invalid.

November 1984 decision in *Gambell I*; the bonuses paid by intervenors and other similarly situated companies at these seven lease sales total $4.19 billion.[44] Four of the seven sales occurred after plaintiffs filed their complaint against Sale No. 57. Aside from Sale No. 57, none was challenged under ANILCA prior to the issuance of leases. The three-part test articulated by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), for deciding whether to apply retroactively the novel construction of a statute shows that *Gambell I* should not be applied to void leases that were issued prior to the date of that decision.

First, *Gambell I* clearly "establish[ed] a new principle of law . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *See*, *Huson*, 404 U.S. at 106. Prior to *Gambell I*, the federal defendants had consistently interpreted ANILCA as not applying to the OCS. Moreover, that interpretation had been endorsed by the district court, and that interpretation had survived initial scrutiny by the Ninth Circuit when it refused to grant plaintiffs' motion for injunctive relief pending appeal. Even *Gambell I* recognized that "reasonable arguments can also be made for a narrow construction of Section 810" as not applying to the OCS. 746 F.2d at 581 (A19).

Second, retroactive application of *Gambell I* to void prior leases will not "further . . . [the statute's] operation." *See*, *Huson*, 404 U.S. at 107. The only violation of ANILCA found for Sale No. 83 was that, when the Department of the Interior stated in the EIS that no stage of the sale would have more than "negligible" impacts on subsistence, it was complying with NEPA and did not have the policies of ANILCA "clearly in mind." (A61). The only violation as to Sale No. 57 concerns issues that might arise at the production stage. Affording plaintiffs retroactive relief to invalidate either sale on these grounds is not necessary to

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[44] Federal Offshore Statistics, Minerals Management Service, pp. 12-15 (Sept. 1984).

further ANILCA's purposes. Assuming that ANILCA applies to the OCS, those purposes could be fully achieved by preparing ANILCA evaluations for all post-*Gambell I* exploration and development/production plans associated with the sales. As the district court found, such post-sale compliance with ANILCA "will be able to remedy any harm caused by the violation" at the leasing stage. (A63).

Third, retroactive invalidation of pre-*Gambell I* leases would result in grave inequities. *See, Huson*, 404 U.S. at 107. Intervenors have made investments of more than $4.19 billion in pre-*Gambell I* leases and have expended hundreds of millions more for exploration. Thus, the burden of retroactive application of *Gambell I* would fall upon intervenors and other similarly situated persons who, in good faith, relied upon the position of the Department of the Interior and the decision of the district court that ANILCA does not apply to the OCS.

Subsequent to *Chevron* v. *Huson*, this Court has declined to give retroactive effect to its construction of federal statutes or to its interpretation of the federal Constitution in cases similar to this one. In *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702, 719-20 (1978), the Court declined to invalidate pension plans successfully challenged under Title VII of the Civil Rights Act, and instead tailored relief to be prospective from the date of the Court's opinion. In doing so, the Court stressed that "the harm [of retroactive application] would fall in large part upon innocent third parties." 435 U.S. at 722-23.[45]

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[45] For similar reasons, the Court in *Arizona Governing Committee for Tax Deferred Annuity* v. *Norris*, 463 U.S. 1073 (1983), gave prospective-only relief regarding a clarification of the principles established in *Manhart*. See 463 U.S. at 1105-07 (Opinion of the Court per Justice Powell); 463 U.S. at 1109-11 (Justice O'Connor concurring and applying *Huson*).

*Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976), applied the *de facto* officer doctrine to sustain the prior actions of the Federal Election Commission, even though the Court held that the Commission had been unconstitutionally appointed. *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982), relied on *Huson* to sustain the prior orders of unconstitutionally appointed bankruptcy judges. *See also*, *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969), where prior to *Huson* the Court refused to invalidate municipal bonds issued pursuant to elections which violated the XIV Amendment:

> "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

The principle that emerges from these cases is that courts should deny equitable relief to invalidate transactions on the basis of an unanticipated construction of a statute or the Constitution when the grant of such relief would result in "injustice or hardship." That principle dictates that OCS leases, issued prior to *Gambell I*'s unexpected declaration that the OCS is "situated in Alaska" for purposes of ANILCA, should not be retroactively invalidated.

## IV. THE NINTH CIRCUIT ERRED IN MANDATING AN INJUNCTION EVEN THOUGH THE BALANCE OF IRREPARABLE HARM WEIGHED AGAINST PLAINTIFFS.

The district court denied plaintiffs' motion for an injunction after finding that "the balance of irreparable harm does not favor the movants" and that the public interest weighed against the issuance of an injunction. (A63). Without branding these conclusions as an "abuse of discre-

tion,"[46] the court of appeals held that the very application of such a balancing test was reversible error.

The Ninth Circuit stated that the plaintiffs did not need to demonstrate the existence of irreparable harm because " '[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.' " *Gambell II*, 774 F.2d at 1423 (A36). Moreover, any consideration of the harm that would befall others and their competing equities was held to be irrelevant. Instead, the "Ninth Circuit rule" was said to be that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances" where an injunction would interfere with a long-term contractual relationship or where it would do more environmental harm than good. 774 F.2d at 1423 (A38).

**A. The Ninth Circuit's *Per Se* Rule Is Directly Contrary to This Court's Holding in *Weinberger* v. *Romero-Barcelo* and to Traditional Equity Principles.**

In *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the district court had refused to enjoin the Navy's discharge of ordnance, despite its holding that the Navy was violating the Clean Water Act. The First Circuit mandated an injunction against future discharges, holding that the Clean Water Act required an injunction whenever a violation occurred. 456 U.S. at 310-11.

This Court reversed. It traced the long history of equity in the federal courts and emphasized that an injunction is an extraordinary remedy which requires a showing of irreparable harm, a balancing of the interests of the affected parties, and a regard for the public consequences of the

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[46] Such a finding is necessary when an appellate court reverses a district court's refusal to grant an injunction because it disagrees with fact-finding relevant to the fashioning of a decree. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982).

order. 456 U.S. at 311-13. While acknowledging that Congress can remove an equity court's discretion, this Court declined so to interpret the Clean Water Act because it did not evidence with sufficient clarity Congress' intention to take such extraordinary action:

> "[T]he comprehensiveness of this equitable discretion is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

456 U.S. at 313, quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). *See also, Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944); *United States* v. *Rodgers*, 461 U.S. 677, 708 (1983); *Mitchell* v. *Robert DeMario Jewelry Inc.*, 361 U.S. 288, 291 (1960).

ANILCA does not limit the scope of equity courts' discretion to grant or to withhold relief regarding violations of Section 810. No provision of ANILCA specifies the remedies to be used for violations of that section.[47] Moreover, Section 810 gives no indication that it must be inflexibly enforced via a *per se* rule.[48] Thus, ANILCA does not constitute a "clear and valid legislative command" to the fed-

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[47] Section 807(a), which deals with violations of Section 804, states that a district court "*may* grant preliminary injunctive relief." 16 U.S.C. § 3117(a) (emphasis added).

[48] *Gambell I* itself recognized that the subsistence interests protected by ANILCA might ultimately yield when they conflict with OCS oil and gas development. 746 F.2d at 582 (A19-20). The Ninth Circuit simply ignored this holding when in *Gambell II* it asserted that "Congress has chosen the protection of subsistence life over oil exploration." 774 F.2d at 1426 n.2 (A43).

eral courts barring the exercise of their normal equitable powers in framing remedies for Section 810 violations.[49]

Rather than analyzing ANILCA from the perspective required by *Weinberger*, the Ninth Circuit simply declared that it had no relevance to this case because *Weinberger* "did not involve the tension between the requirements of [ANILCA] and [OCSLA]," and because it presented only a "narrow question" involving the Clean Water Act. *Gambell II*, 774 F.2d at 1426 n.2 (A42). This attempt to trivialize this Court's holding in *Weinberger* is obviously without merit.

This Court's wide-ranging discussion of equity practice in *Weinberger* shows that it involved more than interpretation of the Clean Water Act. 456 U.S. at 311. Moreover, this Court has on two occasions[50] and the other circuits have on numerous others[51] emphasized that *Weinberger* is

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[49] *Gambell II*'s *per se* rule was based on *TVA* v. *Hill*, 437 U.S. 153 (1978), where this Court held that Congress had limited the district court's discretion to refuse an injunction for a violation of Section 7 of the ESA. 774 F.2d at 1426 (A43). *Hill* has never been cited by this Court for the proposition that every violation of an environmental statute requires an injunction. Indeed, this Court noted in *Hill* that *Hecht* v. *Bowles* had held that, absent a very clear congressional command, a court's equity powers must be broadly construed. *Hill*, 437 U.S. at 193-94.

[50] In *United States* v. *Rodgers*, 461 U.S. at 708, this Court cited *Weinberger* for the proposition that "Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion." In *Park 'n Fly, Inc.* v. *Dollar Park and Fly*, 105 S. Ct. 658, 674 (1984) (dissenting opinion), Justice Stevens cited *Weinberger* for the principle that "injunctions do not issue as a matter of course," even though he dissented in *Weinberger*.

[51] *See, e.g.*, *Greenwood Utilities Commission* v. *Hodel*, 764 F.2d 1459, 1462 (11th Cir. 1985); *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404, 416-17 (1st Cir. 1985); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 581 (7th Cir. 1985); *Sierra Club* v. *Army Corps of Engineers*, 701 F.2d 1011, 1039 (2d Cir. 1983); *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1333 (10th Cir. 1982).

to be given broad application. Only the Ninth Circuit has attempted to limit *Weinberger* to cases arising under the Clean Water Act.[52]

By misunderstanding *Weinberger* and erecting a *per se* rule, the Ninth Circuit committed three fundamental errors that are contrary to that decision and to long-enduring principles governing the award of equitable relief. First, the court of appeals abrogated the requirement that plaintiffs must show irreparable harm. This Court has repeatedly held that the basis for the extraordinary remedy of injunctive relief in the federal courts is harm that is irreparable because of the inadequacy of legal remedies. *Weinberger*, 456 U.S. at 312. This requirement may not be ignored merely because a statute has been violated. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-08 (1976); *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 506-07 (1959).

Second, the court of appeals' *per se* rule disregards the real irreparable harm that would have been suffered by the defendants if an injunction had issued. In the district court, the intervenor-defendants demonstrated that an injunction would result in the loss of $70 million in prior commitments made for exploration. (JA 25-55). Also, Interior argued and the district court found that an injunc-

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[52]Scholars have consistently given *Weinberger* the broad reading implicit in this Court's opinion. *See*, Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 121, 141-46 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 31 (1984); Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 Minn. L. Rev. 865, 878 (1983). *But cf.* Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982). However, even Plater's interpretation is broader than the one advanced by the Ninth Circuit, since he agrees that *Weinberger* allows district courts to authorize temporary noncompliance with a statute when, as here, future compliance is likely.

tion would cause irreparable harm to "this nation's quest for new oil resources and energy independence." (A62-63). These are countervailing equities that *Weinberger* and other cases insist be considered prior to the exercise of federal injunctive power. *Weinberger*, 456 U.S. at 312; *Hecht*, 321 U.S. at 329.

Third, the Ninth Circuit rule withdraws from the district courts their traditional discretionary power to balance the equities. The classic exposition of this role was set out by this Court in *Hecht*, 321 U.S. at 329-30:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. . . ."

The essence of equity has been the power of the Chancellor to mold each decree to the necessities of the particular case. Flexibility rather than rigidity is the rule. Thus, the award of an injunction has never been considered a matter of right, even when there is an undoubted violation of a statute or legal right. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). *See also*, *Weinberger*, 456 U.S. at 311; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946); *Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933); *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 359 (1933).[53]

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[53] The need for flexibility is especially great when, as here, the use of equitable powers will have great consequences for the public interest. *Yakus*, 321 U.S. at 440. Thus, this Court has stated that, when the public interest is implicated, "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.*, 328 U.S. at 398. *See also*, *Weinberger*, 456 U.S. at 312; *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937); *Railroad Commission* v. *Pullman*, 312 U.S. 496, 500 (1941).

### B. The Ninth Circuit's *Per Se* Rule Led to an Injunction that Will Not Remedy Past Violations but Will Instead Merely Punish Innocent Parties.

The sole justification for a preliminary injunction is to prevent plaintiff from suffering irreparable harm pending a decision on the merits. *Sampson* v. *Murray*, 415 U.S. at 88; *Brown* v. *Chote*, 411 U.S. 524, 456 (1973). The sole justification for an injunction following a determination of the merits is to remedy the effects of the violation that a plaintiff has proved when there is no adequate redress at law. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 60; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring). Moreover, as this Court held in *Weinberger*, "the historic injunctive process was designed to deter, not to punish." 456 U.S. at 310 (quoting *Hecht*, 321 U.S. at 329-30).[54] The injunction mandated below violates all of these principles.

Plaintiffs suffered no tangible injury by virtue of Interior's decision to issue Sale Nos. 57 and 83 leases without complying with ANILCA in the manner deemed necessary by the Ninth Circuit. Moreover, the district court found that the conduct of exploration would itself not harm plaintiffs, and the court of appeals did not reverse that finding as an abuse of discretion. The only "harm" that the Ninth Circuit could identify flowing from a violation of ANILCA was the "irreparable damage" that the Ninth Circuit "presume[s] when an agency fails to evaluate thoroughly the environmental impact of a proposed action." 774 F.2d at 1423 (A36).

Even assuming *arguendo* that this type of abstract injury qualifies as "harm" for purposes of fashioning equi-

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[54] *See also, United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *Wallace* v. *Cutten*, 298 U.S. 229, 237-37 (1936).

table remedies,[55] it is clear that that harm occurred once and for all at the time the Sale Nos. 57 and 83 leases were issued. The decisions made by Interior to proceed with leasing in the Sale Nos. 57 and 83 areas without compliance with ANILCA cannot be undone by an injunction against exploration. Moreover, even if those decisions must be reconsidered, after full compliance with ANILCA, an injunction against exploration does nothing to facilitate that reconsideration. Thus, an injunction against exploration does nothing to address the "harm" which the Ninth Circuit declared that plaintiffs had suffered.

The only certain consequence of that injunction is that, had it been issued by the district court when it was initially sought by the plaintiffs, it would have imposed losses of at least $70 million upon industry petitioners, even though they were in no way responsible for the Department of the Interior's compliance with ANILCA. (JA 25-55). Punishment *per se* can never justify an injunction; *a fortiori* an injunction that imposes punishment upon innocent parties is invalid.

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[55] In *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983), the First Circuit advanced the theory that, because NEPA is meant to influence the decision-making process, the harm the Act is designed to avoid occurs whenever a decision is made without taking NEPA into account. This notion of abstract "procedural" harm has been questioned by other courts. *See, e.g., Wisconsin* v. *Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984); *United States* v. *162.20 Acres of Land*, 733 F.2d 377, 378 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985). Whatever its merit, this theory can justify an injunction only in circumstances, like *Massachusetts* v. *Watt*, where it is issued before the decision and thus preserves the opportunity of the federal agency to make a decision after compliance with the relevant statute. *Compare, Alaska* v. *Andrus*, 580 F.2d 465, 486 (D.C. Cir.), *vacated in part on other grounds as moot*, 439 U.S. 922 (1978), where the court refused to enjoin ongoing OCS exploration after discovering a leasing-stage NEPA violation which had occurred two years earlier.

## CONCLUSION

For all the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

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Nos. 85-1239 and 85-1406

# In the Supreme Court of the United States

OCTOBER TERM, 1986

Supreme Court, U.S.
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AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the Ninth Circuit erroneously ruled that a district court must, except in unusual circumstances, enter a preliminary injunction whenever it finds a likely violation of a procedural requirement of an environmental statute.

2. Whether Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, which requires federal land managers to determine whether proposed dispositions of public lands in Alaska "would significantly restrict subsistence uses" and, if so, to follow certain procedures and make certain findings prior to any such disposition, applies to the outer continental shelf (OCS), when the Act defines "public lands" as lands which are "in Alaska" and "the title to which is in the United States."

3. Whether, even if Section 810 applies to the OCS, neither OCS leasing nor exploration may proceed until the Secretary of the Interior complies with Section 810's procedural requirements for all stages of the OCS program, including development and production.

4. Whether a construction that ANILCA applies to the OCS should be given retroactive effect, thereby casting a cloud over more than 600 previously issued OCS leases and $4.2 billion in bonus bids received by the Treasury for those leases.

## PARTIES TO THE PROCEEDING

The petitioners in No. 85-1406 are Donald P. Hodel, Secretary of the Interior, and the United States Department of the Interior. The petitioners in No. 85-1239 are Amoco Production Company, ARCO Alaska, Inc., Exxon Corporation, Mobil Exploration & Producing Services, Inc., Sohio Alaska Petroleum Company, Shell Western E & P, Inc., Texaco, Inc., Union Oil Company of California. The respondents are People of the Village of Gambell, People of the Village of Stebbins, and Nunam Kitlutsisti.

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## BRIEF FOR THE FEDERAL PETITIONERS

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a)[1] is reported at 774 F.2d 1414. The opinion of the district court (Pet. App. 35a-43a) is unreported. An earlier opinion of the court of appeals in this case (*Gambell I*) (Pet. App. 44a-65a) is reported at 746 F.2d 572. An earlier opinion of the district court (Pet. App. 68a-69a) is unreported.

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[1] Pet. App. references are to the appendix to the petition in No. 85-1406.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 79a-80a) was entered on October 25, 1985. On January 13, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 22, 1986. The petition was filed on February 21, 1986, and was granted on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Pertinent provisions of the Alaska National Interest Lands Conservation Act (ANILCA) are reproduced at Pet. App. 116a-122a.

## STATEMENT

This case concerns exploratory drilling by lessees of the federal government in two outer continental shelf (OCS) leasing areas in the Bering Sea: Norton Sound (Lease Sale 57) and the Navarin Basin (Lease Sale 83). In 1984, the court of appeals ruled that Section 810 of ANILCA, 16 U.S.C. 3120, applies to the OCS in Norton Sound, and remanded for further proceedings. The district court subsequently denied respondents' request for a preliminary injunction against exploratory operations in Norton Sound, which had been consolidated with a similar request involving such operations in the Navarin Basin. A divided panel of the court of appeals reversed the district court on the ground that respondents' showing of a likelihood of success on their claim that the Secretary of the Interior violated Section 810 required the issuance of an injunction, notwithstanding the countervailing equities and public interest considerations that led the district court to deny injunctive relief.

1. *Title VIII of ANILCA and OCS Leasing.* Congress enacted ANILCA, 16 U.S.C. 3101 *et seq.*, on December 2, 1980, to preserve for future generations "certain lands and waters in the State of Alaska that contain nationally

significant natural, scenic, historic, archaeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" (16 U.S.C. 3101(a)). To that end, ANILCA established "conservation system unit[s]" (16 U.S.C. 3102(4)). Additionally, ANILCA is intended to "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," as long as that opportunity is provided in a manner consistent with "the purposes for which each conservation system unit is established" (16 U.S.C. 3101(c)).

Title VIII of ANILCA, 16 U.S.C. 3111-3126, creates a framework for protecting "subsistence uses" [2] by rural Alaskans. Section 804, 16 U.S.C. 3114, provides that "subsistence uses shall be accorded priority over the taking on such [public] lands of fish and wildlife for other purposes." Section 805(a)(1) creates a mechanism for administering the preference, directing the Secretary of the Interior to create at least six "subsistence resource regions" which together encompass "all public land" (16 U.S.C. 3115(a)(1)). Within each region the Secretary is to establish an advisory council and, "as he finds necessary," other local advisory committees, in order to receive the expertise of local residents on subsistence issues (16 U.S.C. 3115(a)(2) and (3)). Section 805(d) directs the Secretary not to implement Section 805(a) through (c) if the State "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, Sections 803, 804, and 805" (16 U.S.C. 3115(d)). The Secretary has acknowledged that the

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[2] "Subsistence uses" mean "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade" (16 U.S.C. 3113).

State's laws meet the requirements of Section 805(d). See, generally, Alaska Stat. §§ 16.05.010-16.05.950 (1983 & Supp. 1984).

Section 810 provides that a federal agency must follow certain procedures "[i]n determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands" (16 U.S.C. 3120). The federal agency having "primary jurisdiction" over the relevant public land must first evaluate three factors: the effect of the action on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and alternatives which would "reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes" (*ibid.*). If the action "would significantly restrict subsistence uses," the federal agency must notify the appropriate state agency, as well as any appropriate regional councils and local committees (*ibid.*). The federal agency then must hold a hearing in the vicinity of the area involved, and make three findings (16 U.S.C. 3120(a)(3)):

> that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

2. *The challenge to Lease Sale 57 (Norton Sound).* Lease Sale 57, which took place in March 1983, was preceded by intensive study of possible environmental impacts, including impacts on subsistence uses. The environmental impact statement (EIS) for Lease Sale 57 gave considerable attention to possible impacts on subsistence uses (EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296) and concluded that significant disruption of subsistence uses from all phases of OCS operations

was "unlikely" (*id.* at 142).[3] However, the Department did not follow the specific procedures of Section 810 of ANILCA because it was of the view that ANILCA did not apply to the OCS.

Respondents, the native villages of Gambell and Stebbins, filed a complaint on March 4, 1983, seeking injunctive relief against Lease Sale 57. The complaint charged that the Secretary had failed to comply with Section 810 and that the sale conflicted with the villagers' alleged aboriginal rights to the OCS. The district court denied the villages' motion for a preliminary injunction, and the sale was held on March 15, 1983. On April 4, 1983, the district court denied the villages' motion for summary judgment. It ruled that the meaning of the phrase "public lands"—"'land situated *in Alaska*' to which the United States holds title" (Pet. App. 68a (emphasis in original))—is "clear." Rejecting "plaintiffs' attempts to manufacture an ambiguity," the court concluded that there is "no persuasive evidence that Congress intended the phrase 'public lands', as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska" (*id.* at 69a). The court also held that the villagers have no aboriginal rights to the OCS (*ibid.*; see *Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182, 186 (D. Alaska 1982), aff'd on other grounds, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985)). Based on these rulings, the district court granted summary judgment in favor of the government and the intervenor oil companies (*ibid.*). The villages appealed and moved in the Ninth Circuit to enjoin the issuance of leases pending appeal. That motion was denied by a panel of the court of appeals on May 10, 1983. On that same day, 59 tracts were leased for bonus payments totaling $317,873,372 (Minerals Management Service, *Federal Offshore Statistics* 13 (1984)).

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[3] The final EIS for Lease Sale 57 is part of the record in this case, but has not been reproduced in the joint appendix due to its length. A copy of the EIS has been lodged with the Clerk.

3. *Approval of exploration plans for Norton Sound.* Subsequent to the district court's ruling, but prior to the court of appeals' decision on the merits of the appeal, intervenors Exxon and ARCO (among the petitioners in No. 85-1239) submitted exploration plans covering a number of the tracts in Norton Sound on which they had received leases. Exploration is the third of the "four distinct statutory stages to developing an offshore oil well" created by the 1978 amendments to the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. 1331 *et seq.* *Secretary of the Interior* v. *California*, 464 U.S. 312, 337 (1984).[4] Exploration may proceed only after the lessees demonstrate compliance with any applicable state management program under the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.* The Secretary approved Exxon's exploration plan on December 28, 1983, and ARCO's plan on March 19, 1984. Neither respondents nor anyone else challenged the Secretary's approval of the exploration plans within the 60-day period provided by 43 U.S.C. 1349(c). Accordingly, exploration proceeded in Norton Sound during the summer of 1984 with the drilling of several wells (see, *e.g.*, J.A. 26).

4. *The court of appeals' decision in Gambell I.* On appeal, the court of appeals reversed the district court's ruling on Section 810 and affirmed its ruling on the aboriginal claims on other grounds (*Gambell I*, Pet. App. 44a-65a). The court first addressed the aboriginal claim by "assum[ing] rather than deciding that appellants had an aboriginal right to hunt and fish in the waters of Norton Sound above the lands involved in the lease-sale" (*id.* at 45a n.1). The court concluded that these rights had been extinguished by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1603(b) (Pet. App. 46a-57a).

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[4] The four stages of the OCS process are: (1) planning a five-year nationwide leasing program (43 U.S.C. 1344); (2) conducting a lease sale (43 U.S.C. 1337(a)); (3) exploration (43 U.S.C. 1340); and (4) development and production (43 U.S.C. 1351).

The court next turned to Section 810, reviewing first the legislative history of ANILCA to determine whether the phrase "public lands" was intended to apply to the OCS. Relying on several instances where legislators appeared to refer to the OCS as being "in Alaska" (Pet. App. 58a) and noting that ANCSA and Title VIII of ANILCA "are clearly related," the court found it a "reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of [ANILCA] to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary" (*id.* at 59a). The court also found "compelling" that Title VIII of ANILCA "was adopted to benefit the Natives" and on that basis chose to resolve any "ambiguit[y]" in the statute in their favor (*id.* at 62a-63a). Accordingly, the court ruled that the phrase "public lands" included "outer continental shelf lands and waters contiguous to the State of Alaska" (*id.* at 58a).

The court of appeals did not reach the question whether Interior had substantially complied with Section 810 in the course of complying with other environmental statutes or, if not, whether the Sale 57 leases should be voided. Instead, the court remanded the case to the district court for a determination of those issues and the framing of an appropriate remedy (Pet. App. 65a).

5. *Interior's post-Gambell I subsistence evaluation for Lease Sale 57.* In accordance with the court of appeals' decision in *Gambell I*, Interior began to integrate the requirements of Section 810 into its Alaska OCS leasing program. With respect to Lease Sale 57, Interior determined to reevaluate subsistence issues, including those already studied in the EIS for the sale. Interior's post-sale Section 810 evaluation was issued on April 22, 1985 (Pet. App. 81a-106a). The evaluation document followed the stage-by-stage approach set out in the OCSLA (see note 4, *supra*) (id. at 84a). The evaluation document nonetheless analyzed, to the extent feasible, possible im-

pacts that might arise at those future stages of the OCS process (*ibid.*).

The evaluation document found that the execution of leases (which permits lessees to conduct only limited preliminary activities on the OCS) had not and would not significantly restrict subsistence uses (Pet. App. 103a). The evaluation document further found that the exploration stage activities that had occurred in Norton Sound to date had not significantly restricted subsistence uses and were not likely to do so in the future (*id.* at 103a, 106a). The evaluation document noted that a separate Section 810 evaluation would be performed for each subsequent exploration plan submitted for the Secretary's approval (Pet. App. 85a). Finally, the evaluation document found that, if development and production activities were ever conducted in the Lease Sales 57 area, which was not likely, they might, in the event of a major oil spill, significantly restrict subsistence uses for limited periods in limited areas (*id.* at 92a-99a).[5] The evaluation document stressed that more definitive judgments could be made only if and when a particular development and production plan were submitted for approval and that a separate Section 810 evaluation would be prepared at that time (Pet. App. 85a).

6. *Lease Sale 83 (Navarin Basin).* Lease Sale 83 was conducted on April 17, 1984, without litigation challenge, and resulted in the leasing of 163 tracts for total bonus payments of $516,317,331 (Minerals Management Service, *Federal Offshore Statistics* 15 (1982)). The Basin is so far from land—more than 250 miles from the nearest inhabited land (St. Lawrence Island) and more than 350 miles from the mainland—that no Native subsistence harvesting occurs there. Nevertheless, the possible subsistence effects of Lease Sale 83 were examined in the lease sale EIS (EIS III-60 to III-75, IV-20 to IV-68,

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[5] To this extent, the findings differed from those of the EIS discussed on pages 4-5, *supra*.

IV-81 to IV-90, IV-106, IV-112) and found to be negligible (*id.* at IV-83 to IV-84).[6]

Interior approved exploration plans for the Navarin Basin on December 28, 1984 (Exxon), January 23, 1985 (ARCO), and April 19, 1985 (Amoco). These approvals were made after the court of appeals' ruling in *Gambell I* and accordingly contained explicit Section 810 evaluations. See, *e.g.*, Pet. App. 107a-115a (Section 810 evaluation for Exxon's exploration plan). No challenges to these approvals were brought within the 60-day period provided in 43 U.S.C. 1349(c)(3)(C). In reliance on the approvals, the three companies proceeded to commit more than $60 million in preparation for the 1985 drilling season (J.A. 35-52).

7. *Proceedings on remand in the district court.* On April 3, 1985, the villages returned to the district court seeking a preliminary injunction against exploratory activities in the Lease Sale 57 area. By that time, intervenor Exxon had committed more than $10 million toward the drilling of two exploratory wells in Norton Sound during the ice-free months of 1985 (J.A. 30-34).

On April 23, 1985, more than a year after Lease Sale 83 had been held, respondent Village of Gambell, joined by respondent Nunam Kitlutsisti, an organization of Yukon Delta Natives, filed a complaint seeking to void Lease Sale 83 and enjoin imminent exploratory drilling in the Navarin Basin. The Lease Sale 83 complaint, like that in the Lease Sale 57 litigation, alleged violations of Section 810 and also added a claim that the Secretary, by conducting the lease sale, had breached trust duties owed to the Natives.

After consolidating the requests for preliminary injunctions in the Lease Sale 57 and Lease Sale 83 cases, the district court denied the motions on May 23, 1985 (Pet. App. 35a-43a). The court found that respondents

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[6] A copy of the Lease Sale 83 final EIS has been lodged with the Clerk (see note 3, *supra*).

had "established a strong likelihood of success on the merits" (*id.* at 43a). Specifically, the court reasoned that even though the Secretary's environmental impact statements for both lease sales had included the type of evaluation of subsistence impacts called for by Section 810, those evaluations were necessarily deficient because the Secretary "did not have the policy precepts of ANILCA in mind at the time of evaluation" (Pet. App. 37a-38a). The court went on to examine Interior's post-sale ANILCA compliance document for Lease Sale 57 (see pages 7-8, *supra*). The court did not question that this document adequately evaluated the effects of leasing on subsistence uses, nor did it question Interior's conclusion that neither the leasing nor the exploration stage of the OCS process would significantly restrict subsistence uses. However, the court concluded that the notice, hearing, and findings requirements of Section 810(a)(1)-(3) should have been followed, in light of Interior's determination that a significant restriction on subsistence uses might occur at the development and production stage, should that stage ever be reached (Pet. App. 40a-41a).

The district court nevertheless concluded that the equities weighed against the issuance of an injunction prohibiting continued exploratory activities. First, the OCSLA gives the Secretary continuing power to control and shape the offshore leasing process; hence, if compliance with the requirements of Section 810 reveals a need to alter leasing conditions or configurations, the Secretary retains the power to do so (Pet. App. 43a). Second, it was apparent that the only activity planned at this time, exploration, would not significantly restrict subsistence uses (*ibid.*). Third, the national interest in expedited OCS exploration declared in 43 U.S.C. 1332(3) might be frustrated by an injunction (Pet. App. 43a).

8. *The court of appeals' decision in Gambell II.* Respondents appealed from the district court's denial of injunctive relief and sought an emergency injunction against the ongoing exploratory drilling in the two lease

sale areas. On June 6, 1985, a panel of the court of appeals denied the motion, but directed the Secretary, in conjunction with the intervenor oil companies, to file a "hold harmless agreement that will protect [the villages] from any consequences resulting from significant restrictions upon subsistence uses by [the villages] of their lands" (Pet. App. 70a). A hold harmless agreement was submitted to the court of appeals on June 13, 1985 (*id.* at 72a-76a) and approved by the court, with minor revisions, on June 21, 1985 (*id.* at 77a-78a).

Exploratory drilling proceeded without incident in both lease sale areas throughout the summer and fall of 1985. On October 25, 1985, a divided panel of the court of appeals reversed the district court's denial of preliminary injunctive relief (*Gambell II*, Pet. App. 1a-34a). The court of appeals affirmed the district court's ruling that the villages had established a strong likelihood of success on the merits, agreeing with the lower court that the Secretary could not have substantially complied with Section 810 of ANILCA because he did not have its mandate "clearly in mind" when he decided to conduct the lease sales (Pet. App. 8a-12a).[7] Turning to the post-sale Section 810 evaluation for Lease Sale 57 (see pages 7-8, *supra*), the court of appeals agreed with the district court that Interior's finding that development and production activities, if they ever occur, "may significantly restrict subsistence uses in certain areas" (Pet. App. 85a) required the Secretary to conduct the hearing and make the findings required by Section 810(a)(1)-(3) prior to conducting the lease sales. The court dis-

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[7] Inexplicably, the court of appeals stated (Pet. App. 9a) that "in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses and needs of the Native Alaskans," even though the district court had found the opposite, relying on a record that clearly showed that the Secretary had performed detailed subsistence evaluations in the environmental impact statements prepared for the two sales (*id.* at 37a, 41a-42a).

tinguished *Secretary of the Interior* v. *California*, on the ground that the decision did not deal with ANILCA (Pet. App. 13a).

The court of appeals next held that the equitable considerations relied upon by the district court in denying a preliminary injunction did not "excuse its duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail [on the merits]" (Pet. App. 15a). The court of appeals did not disagree with the district court's finding that "exploration will not significantly restrict subsistence resources" (*ibid.*). Instead, the court ruled that "'[i]rreparable damage is presumed'" whenever an agency has failed to comply with "a substantive procedural [requirement] of an environmental statute" (*ibid.*, quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)) and, accordingly, an injunction is required except in "unusual circumstances" (Pet. App. 15a, 19a). The court of appeals limited "unusual circumstances" to where enjoining a project from proceeding in likely violation of an environmental statute would cause more environmental harm than good (*id.* at 17a) or would interfere with certain types of long-term contracts (*id.* at 16a, 19a). In this case, the court of appeals held that the district court erred in finding "unusual circumstances" based on either the harm an injunction would cause to the national interest in expedited OCS development or the ability of the Secretary to alter the configuration of OCS activities if ANILCA subsistence studies show that to be necessary at any future stage of exploration or development (*id.* at 16a, 19a, 20a).

The court of appeals rejected the district court's findings with respect to the public interest, which were bottomed on the policy declared by Congress in the OCSLA to expedite exploration of the OCS. The court concluded that ANILCA effectively superseded this congressional policy (Pet. App. 20a-21a). Finally, the court rejected arguments that it was improper to apply *Gambell I* retro-

actively to Lease Sale 83 (*id.* at 22a-25a) and that the respondents' challenge to Lease Sale 83 was barred by laches (*id.* at 25a-26a).

District Judge Dimmick, sitting by designation, dissented (Pet. App. 28a-34a). Judge Dimmick noted that the government and the oil company intervenors "presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources," as well as evidence that the oil companies would have lost up to $70 million if the preliminary injunction had been granted (*id.* at 30a). In contrast, the villages had presented only evidence of "speculative harm" (*ibid.*). The dissent asserted (*id.* at 29a) that the majority's "rigid approach to the issuance of an injunction" was contrary to *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The dissent also disagreed (Pet. App. 31a-32a) with the majority's retroactive application of *Gambell I* to Lease Sale 83.

## SUMMARY OF ARGUMENT

### I

Under traditional principles of equity, a mere showing that a statute has been or likely has been violated is not sufficient to require the extraordinary remedy of injunctive relief. The court must also determine whether injunctive relief is necessary to avoid irreparable injury to the party seeking that relief and consider the harm to others, as well as the public consequences, that such relief would entail. Applying these principles in this case, the district court properly denied respondents' request for a preliminary injunction on the ground that both the balance of irreparable harm and the public interest counseled against injunctive relief.

The court of appeals reversed on the erroneous ground that federal district courts lack their traditional equitable discretion in the enforcement of the procedural require-

ments of environmental statutes, such as Section 810 of ANILCA. Specifically, the court held that district courts must, except in unusual circumstances, presume both that "irreparable harm" has resulted from a likely violation of an environmental procedural requirement and that the "public interest" elevates environmental values over other competing public concerns. Because neither of these limitations on the district courts' equity jurisdiction is rooted in clearly expressed congressional intent, their imposition is inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). Nowhere in ANILCA did Congress suggest that injunctive relief is invariably required to preserve the efficacy and policy objectives of the Section 810 procedures. Nor did Congress anywhere suggest that those policy objectives supersede all other public interest concerns relevant to an award of injunctive relief in a particular case.

The circumstances of this case underscore the inappropriateness of applying such unsupported generalizations. Injunctive relief is plainly not necessary in this case to preserve the meaningfulness of Section 810 procedures or to redress any irreparable injury to respondents' interests. If it is ultimately resolved that Interior violated Section 810, compliance may be achieved before the development and production stage, which is the only stage that poses even a potential threat of a significant restriction on subsistence uses. Accordingly, because no significant restrictions were threatened absent an injunction, no public interest concerns favored the issuance of such relief. Concomitantly, the court of appeals' refusal to consider the weighty public interest considerations counselling against injunctive relief—particularly the express congressional goal of expedited exploration and development of the OCS—was without legal basis.

## II

At all events, the relief in this case was predicated solely on the likelihood of a violation of a statutory requirement that is entirely inapplicable to the actions at

issue. Section 810 of ANILCA, 16 U.S.C. 3120, does not require a federal agency to evaluate the effects of every category of federal actions that might adversely affect subsistence resources. Section 810 concerns only effects on subsistence uses caused by proposed dispositions of "public lands," which ANILCA defines as lands that are both "situated in Alaska" and "the title to which is in the United States" (16 U.S.C. 3102(2) and (3)). The OCS meets neither statutory criterion. The OCS is, by definition, outside the boundaries of Alaska, and Congress has carefully and repeatedly declined to equate the federal government's interest in the OCS with the concept of title. Hence, dispositions of the OCS necessarily fall outside the scope of Section 810 even if they might affect subsistence resources.

Respondents' contrary view ignores the plain meaning of the statutory definition of "public lands" and mistakenly relies on isolated, casual remarks in the legislative debates and canons of statutory construction relevant only to the judicial construction of ambiguous statutory terms. In all events, ANILCA's legislative history and background and its statutory structure confirm that Congress did not intend to depart from traditional practice by including the OCS within "public lands." The clear consensus of the legislators, reflected throughout the Act's legislative history, was that its requirements would not extend beyond the state's boundaries and therefore would have no effect on oil and gas development on the OCS.

## III

Even if Section 810 of ANILCA were thought to apply to the OCS, the court of appeals erred in rejecting the Secretary's post-sale compliance effort for Sale 57. In its Section 810 evaluation, Interior found that the lease sale stage of the OCS leasing process would not lead to significant subsistence restrictions; accordingly, the additional notice, hearing, and findings requirements of Section 810

were not followed. The Section 810 evaluation noted as well that if the development and production stage were reached, which was unlikely, a significant subsistence restriction might occur in certain localities. The court of appeals ruled that the mere threat of a significant restriction at the development and production stage triggered the notice, hearing, and findings requirement of Section 810(a)(1)-(3), 16 U.S.C. 3120(a)(1)-(3), at the leasing stage. This construction of Section 810 conflicts with its plain language and is inconsistent with this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984).

In *Secretary of the Interior* v. *California*, this Court concluded that because the OCS leasing process consists of distinct stages, with each stage involving separate regulatory review and an additional transfer of rights to conduct activities on the OCS, the lease sale stage could not be deemed to have a "direct effect" on the coastal zone based on impacts potentially arising only at later stages. By its plain terms, Section 810 applies to each distinct stage separately; hence, as in *Secretary of the Interior* v. *California*, a lease sale should not be deemed to restrict significant subsistence resources based on restrictions potentially occurring (if at all) only at the development and production stage. To be sure, in performing a Section 810 evaluation for one stage, the agency may look to possible future stages, but for the purposes of determining whether the additional procedural requirements of Section 810 are triggered, the only relevant inquiry is whether the particular disposition of lands at issue—in this case the lease sale—"would significantly restrict subsistence uses" (16 U.S.C. 3120). In any event, because the Secretary found in this case that the development and production stage is not likely to occur at all, it is clear that the statutory standard that the proposed disposition "would significantly restrict subsistence uses" has not been met.

## IV

Finally, even if this Court should agree with the court of appeals in *Gambell I* that Section 810 of ANILCA applies to the OCS, that construction should not, under this Court's criteria in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), be applied retroactively to either Lease Sale 57 or Lease Sale 83. First, *Gambell I* declared a new principle of law, which differed from prior agency construction and the district court's construction. Second, retroactive application of *Gambell I* would further no policy objective of Section 810 because Interior consistently carried out substantial pre-leasing analyses of subsistence pursuant to NEPA. The Department of the Interior has announced, moreover, that it will not (if *Gambell I* is upheld) approve exploration or production plans without additional Section 810 reviews. Finally, the equities weigh strongly against retroactive application. Balanced against respondents' desire for a reevaluation of matters already thoroughly studied are the strong public interest in avoiding unnecessary disruptions to OCS development, as well as the enormous investments made by the oil companies pursuant to the lease sales.

## ARGUMENT

### I. THE NINTH CIRCUIT RULE THAT SECTION 810 OF ANILCA AND COMPARABLE ENVIRONMENTAL PROCEDURAL REQUIREMENTS DENY FEDERAL DISTRICT COURTS TRADITIONAL EQUITABLE DISCRETION WITH RESPECT TO THE ISSUANCE OF INJUNCTIVE RELIEF IS CONTRARY TO THIS COURT'S DECISION IN *WEINBERGER* V. *ROMERO-BARCELO*, 456 U.S. 305 (1982)

The court of appeals' ruling that the district court abused its discretion in denying respondents' motion for a preliminary injunction is inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The district court denied that motion on the

grounds that "[t]he balance of irreparable harm does *not* favor the [respondents]" and that "[t]he public interest favors continued oil exploration" (Pet. App. 43a (emphasis in original)). The court stressed that "delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence," contrary to explicit congressional policy (see 43 U.S.C. 1332(3)), and that "exploration will not significantly restrict subsistence resources" (Pet. App. 43a). In reversing, the court of appeals disputed the district court's characterization of the "public interest" (*id.* at 19a-21a), but did not disturb its finding that an injunction was not necessary to prevent irreparable harm to respondents' interests.[8] Instead, the appellate court purported to distinguish *Romero-Barcelo*, in which this Court stressed that "the basis for injunctive relief in the federal courts has always [included] irreparable injury" and upheld a district court's refusal to follow a different

[8] In an attempt to deny the court of appeals' express rationale, respondents (Br. in Opp. 26) and the State of California as amicus curiae (Br. 4) seize upon the court's isolated statement that "[t]he by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans" (Pet. App. 21a (citing R. Little & L. Robbins, *Technical Report No. 89, Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island* 330-374 (1984))). The court of appeals, however, clearly did not base its ruling on any such unsupported factual finding. The Department of the Interior in this case made explicit findings, never challenged by respondents, that exploration would not significantly restrict subsistence resources in the two lease sale areas. Indeed, as the court of appeals recognized (Pet. App. 15a), the district court found that the injury Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from exploration stage activities (Pet. App. 43a). The court of appeals did not overturn this finding as clearly erroneous (the record certainly would not have supported such action), but instead ruled that lack of harm did not qualify as an "unusual circumstance" excusing the mandatory issuance of an injunction (*id.* at 15a).

approach for violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.* (456 U.S. at 312, 314-320). See Pet. App. 21a-23a n.2. In our view, *Romero-Barcelo* is controlling and, as in that case, the district court's denial of injunctive relief was proper.

1. In *Romero-Barcelo*, this Court thoroughly reviewed basic principles of equity jurisprudence in the federal courts and addressed, in particular, the application of those principles to violations of federal statutes, including federal environmental protection laws. Starting with the proposition that an injunction " 'is not a remedy which issues as of course' " (456 U.S. at 311 (quoting *Harrisonville* v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-338 (1933)), the Court stated that the foundation for "injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies" (456 U.S. at 312). Moreover, consideration of the equities is essential: "Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims" (*ibid.* (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). " 'The essence of equity jurisdiction,' " the Court stated, is " 'to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it' " (456 U.S. at 312). Finally, the Court admonished that "courts of equity should pay particular regard for the public consequences in employi ç the extraordinary remedy of injunction" (*ibid.*).

These principles apply with special force to the issuance of preliminary injunctions. In the preliminary injunction context, the court will often not have had an opportunity to consider fully the merits of the case,[9] thereby making the sole justification for the exercise of equitable power the maintenance of the status quo pending completion of

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[9] While this may have been true of the district court in the present case, the court of appeals appears to have fully addressed the merits (see note 14, *infra*).

the litigation. Cf. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 9-11 (1942). Accordingly, the plaintiff must demonstrate that, in the absence of a preliminary injunction, it will suffer actual and substantial injury that is truly irreparable, *i.e.*, incapable of remedy by relief ordered at the termination of the litigation. See *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). Moreover, the court must consider the injury to the defendant and the public interest that would be occasioned by the entry of even a temporary injunction. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). In an appropriate case, irreparable damage to the public interest will justify withholding preliminary relief even though the burden on the plaintiff is substantial. *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944).[10]

In this case (and in those prior decisions upon which the court of appeals relied), the Ninth Circuit rejected these well established principles and applied a rule that, in effect, requires a district court to enter the injunction requested by the plaintiffs whenever it finds a violation, or probable violation, of a "substantive procedural" [11] requirement of an environmental statute (Pet. App. 14a-

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[10] Taken together, these considerations constitute the familiar four-part test that traditionally has governed the issuance of preliminary injunctions, stays, and other forms of temporary equitable relief in the federal courts. See, *e.g.*, *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). In *Virginia Petroleum Jobbers*, 259 F.2d at 925, the court articulated the test as follows: (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the moving party has shown that without such relief, it will be irreparably injured; (3) whether the issuance of a stay would substantially harm other parties; and (4) whether injunctive relief would be in the public interest.

[11] Although the court below stated that "[a]n injunction is the appropriate remedy for a substantive procedural violation of an environmental statute" (citing *Thomas* v. *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985)), the court's opinion in *Thomas* actually referred to "a *substantial* procedural violation" (*ibid.* (emphasis added)). Whether the discrepancy was deliberate or unintended does not

19a).[12] That rigid approach to injunctive relief in environmental suits cannot be reconciled with *Romero-Barcelo*. For, without basis in expressed congressional intent, it sharply curtails, if not eliminates altogether, the traditional authority of federal courts to consider the equities of awarding injunctive relief in a particular case.

This Court made plain in *Romero-Barcelo* that while "Congress may intervene and guide or control the exercise of the courts' [equitable] discretion, * * * we do not lightly assume that Congress has intended to depart from established principles" (456 U.S. at 313 (citations omitted)). "'[C]omprehensiveness of * * * equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Ibid.* (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also 456 U.S. at 322 (Stevens, J., dissenting)) ("Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion."). The "purpose and language of the statute under consideration * * *, not the bare fact of a statutory violation," determine whether Congress took the extraordinary step of curtailing the courts' discretion in the exercise of their equitable jurisdiction (456 U.S. at 314).

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affect our submission that the court of appeals' analysis is inconsistent with *Romero-Barcelo*.

[12] As noted (see page 12, *supra*), the Ninth Circuit's rule admits of only two exceptions. Injunctive relief may be denied if such relief would itself cause irreparable harm to the environment or if such relief would interfere with certain types of long-term contracts (Pet. App. 16a, 19a). The contractual-interference exception is evidently quite narrow, because the court of appeals did not apply it in this case despite the fact that injunctive relief against exploratory operations interferes with the intervenor oil companies' right to explore pursuant to their contracts with the government and their approved exploration plans.

Hence, in *TVA* v. *Hill*, 437 U.S. 153 (1978), this Court held that a permanent injunction was required precisely because the statutory provision that was violated (Endangered Species Act, 16 U.S.C. 1536) amounted to a "flat ban" for which "only an injunction could vindicate [its] objects" (*Romero-Barcelo*, 456 U.S. at 314). By contrast, in *Romero-Barcelo* the Court held that in the Clean Water Act, 33 U.S.C. 1251 *et seq.*, Congress has not evinced in the language, structure of the Act, or its legislative history sufficient intent to "deny courts their traditional equitable discretion" (456 U.S. at 319). While the Clean Water Act plainly prohibits discharges into navigable waters absent a federal permit (see 33 U.S.C. 1311) and the Navy in that case had no permit, the Court concluded that accomplishment of the Act's objectives did not require the issuance of an injunction.

2. Here, as in *Romero-Barcelo*, there is no clear indication that Congress intended to deny federal district courts their traditional equitable discretion in enforcing Section 810 of ANILCA. Section 810's requirement that certain steps be taken prior to a proposed disposition of public lands that would significantly restrict subsistence uses does not address the distinct issue whether a district court must award certain relief when a violation or a likely violation of that requirement has been established. Indeed, the inherently procedural nature of Section 810 strongly suggests that Congress did not intend to deny the courts their traditional equitable discretion. By its very nature, a procedural requirement is ancillary to the substantive policy objectives of the statute and, hence, whether its violation requires the extraordinary remedy of injunctive relief should normally turn on the particular circumstances of the case. See *Romero-Barcelo*, 456 U.S. at 314 ("Respondents suggest that failure to enjoin the Navy will undermine the integrity of the permit process by allowing the statutory violation to continue. The integrity of the Nation's waters, however, not the permit process, is the purpose of the [Clean Water

Act]."). Similarly, here Congress stressed both that Section 810's requirements are "procedural" and that, once those requirements are satisfied, "the proposed action may proceed even though its effect may be adverse to subsistence uses" (S. Rep. 96-413, 96th Cong., 1st Sess. 234 (1979)).

The court of appeals' contrary analysis rests on two premises. The first is that "'[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action'" (Pet. App. 15a, quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). The second is that the "public interest" favors injunctive relief because the interests served by federal environmental procedural requirements, such as ANILCA, supersede all other interests that might be at stake in a particular case (see Pet. App. 19a-21a, 23a n.2; see also *Save Our Ecosystems*, 747 F.2d at 1250). The fundamental flaw in these premises is that neither is based on clear expression of congressional intent.[13] Their inappropriateness in the circumstances of this case, moreover, both exposes the dangers of such unsupported generalizations and underscores the importance of traditional case-by-case review.

a. First, while we fully agree that the possibility of irreparable harm must be a central focus of the judicial inquiry in environmental cases, there is no basis for presuming that such harm will invariably occur unless injunctive relief is provided to remedy a violation of an environmental statutory requirement, such as Section 810 of ANILCA. Where, as here, the moving party has made no showing of irreparable harm and the purpose of the requirement purportedly violated is largely to assess the environmental impact of the proposed governmental

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[13] While the Senate Report states that "until the requirements of * * * section [810] have been satisfied the proposed action may not proceed" (S. Rep. 96-413, *supra*, at 234), the statement is part of a single sentence that goes on to explain that a "proposed action may proceed even though its effect may be adverse to subsistence uses" (*ibid.*).

action (rather than flatly to prohibit it), the propriety of injunctive relief should turn on traditional considerations, including whether such relief is necessary to render compliance with the requirement meaningful. As other courts of appeals have properly recognized, an injunction to redress a violation of an environmental statute, particularly an environmental procedural requirement, is not always necessary to preserve the decisionmaker's opportunity to implement the statute in the manner intended by Congress. See, *e.g.*, *Alaska* v. *Andrus*, 580 F.2d 465, 485 (D.C. Cir.) (injunction against an ongoing project available only where necessary "to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by [the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*]"), vacated in part on other grounds as moot *sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978); see also *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983); *Sierra Club* v. *Hennessy*, 695 F.2d 643, 648-649 (2d Cir. 1982).

Here, there is no reason to believe that additional exploratory drilling by the oil companies would have made future compliance with Section 810 meaningless either in fulfilling its procedural requirements or in accomplishing its policy objectives. If it is ultimately resolved that Interior violated Section 810, compliance may be effected before the production stage—the only stage that poses even a potential threat of a significant restriction on subsistence uses (see page 8, *supra*). Interior made explicit findings that exploration would not significantly restrict subsistence resources in the two lease sale areas (see Pet. App. 85a, 90a, 92a, 95a, 98a, 99a, 101a, 103a, 106a, 108a-115a), and those findings have neither been challenged by respondents nor questioned by the court below. Indeed, the district court explicitly found (*id.* at 43a) that the injury Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from explo-

ration activities, and that Interior possesses adequate continuing authority over the OCS development process to cure any statutory violation. An order directing Interior to comply with Section 810 would, therefore, be at least as effective as the order issued by the district court in *Romero-Barcelo*, which directed the Navy to apply for a discharge permit under the Clean Water Act (see 456 U.S. at 309-310).[14] As in *Romero-Barcelo*, injunctive relief is not automatically necessary. The court of appeals, however, gave no deference to the district court's findings, and undertook no particularized analysis regarding whether irreparable harm would result to the interests protected by the statute—the finding of probable statutory violations started and ended its inquiry.[15]

b. Similarly, the court of appeals' assumption that the "public interest" automatically favors an injunctive remedy for violations of environmental procedural

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[14] The court of appeals' attempt (Pet. App. 23a n.2) to distinguish *Romero-Barcelo* on the ground that it involved a permanent rather than a preliminary injunction is wholly unpersuasive. A district court should have greater, not less discretion in considering whether preliminary relief is appropriate. In all events, the distinction is unavailing here because the court of appeals addressed the merits of this case as if it were considering a permanent injunction; the court made definitive rulings (Pet. App. 9a-14a, 22a-26a) which it has subsequently treated as binding precedent. See *Tribal Village of Akutan* v. *Hodel*, 792 F.2d 1376 (9th Cir. 1986) (*reprinted in* U.S. Reply Memo App.).

[15] The asserted violations in this case were, moreover, plainly insubstantial. In the Sale 83 case, for example, the district court found that the Secretary had "considered the relevant factors" required by Section 810 and had not erred in finding that the lease sale and subsequent stages of the OCS process, including development and production, would have "negligible" or "nonexistent" impacts on subsistence uses (Pet. App. 41a-42a). Nevertheless, the diestrict court and the court of appeals found a violation of Section 810 solely because the Secretary made his subsistence findings pursuant to NEPA, rather than Section 810, and thus did not have the policy precepts of Section 810 "clearly in mind" (Pet. App. 8a, 38a).

statutes lacks the necessary supporting indicia of congressional intent and is rebutted by the circumstances of this case. Contrary to the reasoning of the court of appeals, ANILCA plainly does not evince an unambiguous congressional intent to "cho[ose] the protection of subsistence life over oil exploration" (Pet. App. 23a n.2). To be sure, Title VIII of ANILCA, including Section 810, was intended "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so" (16 U.S.C. 3101(c)). But the Act nowhere suggests that goal is to be achieved without compromise and no matter what the costs—indeed, as previously described (page 23, *supra*), quite the opposite is true (see S. Rep. 96-413, *supra*, at 234).[16]

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[16] The court of appeals' even broader presumption that Congress intended to elevate all environmental concerns over other competing national concerns is similarly flawed. This Court has rejected the notion that Congress intended generally to elevate environmental interests above other interests affected by a requested injunction. *Romero-Barcelo*, 456 U.S. at 316-319; see also *Aberdeen & Rockfish R. R.* v. *SCRAP*, 409 U.S. 1207, 1217-1218 (1972) (Burger, C.J., Circuit Justice) (recent environmental legislation, "however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. * * * The decisional process for judges is one of balancing and it is often a most difficult task."); cf. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 228 n.2 (1980) (NEPA does not require agency "to elevate environmental concerns over other, admittedly legitimate, considerations"). The Court in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407 (1976), for instance, stated that an injunction against coal mining ordered by the court of appeals in that case would have been erroneous even if that court's finding of a NEPA violation were correct because "in simple equitable terms there were no grounds for the injunction * * *" (427 U.S. at 407-408). In *Kleppe*, the district court had found that an injunction would have caused irreparable harm to the companies who sought to carry out their business ventures, and to the public who depended upon their operations, and the court of appeals had neither challenged that finding nor identified any imminent harm to the interests protected by NEPA (*ibid.*).

Because the court of appeals erroneously assumed that the "public interest" favored an injunction, that court failed to consider either Interior's and the district court's findings that significant subsistence restrictions were not at stake (see pages 8, 9, 10, *supra*) or the weighty countervailing public interest considerations counseling against injunctive relief in this case. Most fundamentally, as the district court found (Pet. App. 43a), enjoining exploratory activities threatens to cause irreparable harm to the congressionally mandated goal of expedited exploration and development of the OCS (see 43 U.S.C. 1802(1), 1802(9)). And, as the dissent below recognized (Pet. App. 30a), if the district court had enjoined exploratory activities at the outset of the 1985 season, as respondents had requested, such relief would have caused huge unrecoverable monetary losses to the intervenor oil companies, whose expenditures were made in reliance upon the Secretary's unchallenged approvals of their exploration plans. In sum, the application in this case of the court of appeals' preclusion of traditional equitable discretion has led to the entry of injunctive relief serving no substantial purpose other than to threaten irreparable harm to the public interest in expedited exploration and development of the OCS.

## II. SECTION 810 OF ANILCA DOES NOT APPLY TO DISPOSITION OF AREAS OF THE OCS BECAUSE THEY ARE NOT "PUBLIC LANDS" WITHIN THE MEANING OF ANILCA

At all events, the relief in this case was predicated solely on the likelihood of violation of an environmental statutory requirement that is entirely inapplicable to the actions at issue. Section 810 of ANILCA requires a federal agency to evaluate the effect of its proposed disposition of "public lands" in Alaska on subsistence uses and needs (16 U.S.C. 3120). Its terms do not apply to any other federal actions that may affect subsistence uses and needs in Alaska. The only actions of the Secretary of the

Interior at issue in this case exclusively concern the OCS—which is *not* an area of "public lands" within the meaning of ANILCA. Respondents' contrary view, adopted by the court of appeals, ignores the plain meaning of the term "public lands," as expressly defined in ANILCA. Respondents' reliance on isolated, casual remarks in the legislative history and canons of statutory construction for ambiguous statutory terms, therefore, is misplaced; in all events, both the legislative history and the statutory structure of ANILCA confirm the view that the OCS lies outside Section 810's scope.

1. "[D]eference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally require us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985) slip op. 10 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). In ANILCA, Congress carefully crafted a definition of "public lands" that leaves no room for an inference that Congress intended to include the OCS.[17] For the purposes of

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[17] Moreover, in traditional usage "public lands" refers only to onshore holdings of the federal government and does not include the OCS. See, *e.g.*, *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894) (tidelands are not "public lands"); Public Land Law Review Commission, *One Third of the Nation's Land* 30 (1970) ("the mineral resources in the Outer Continental Shelf" do "not constitut[e] public land interests in the usual legal or lay definitions of public lands"); S. Rep. 1444, 88th Cong., 2d Sess. 10 (1964) (letter from Acting Secretary of the Interior, John A. Carver, Jr.) ("lands of the [OCS] are not public lands"); H.R. Rep. 1008, 88th Cong., 1st Sess. 14 (1963) (same); see also U.S. Dep't of Interior, *Public Land Statistics* 113 (1985) (excluding "lands located on the [OCS]" from definition of "public lands"). Hence, when Congress intends to include the OCS within the term "public lands" in a particular statutory context, Congress typically makes that intent explicit. See, *e.g.*, 43 U.S.C. 155 (defining "public lands" for purposes of withdrawal, reservation, or restriction for defense purposes as including the OCS); Pub. L. No. 88-606,

ANILCA, "public lands" is defined (with certain exceptions not relevant here) as "land[s] situated in Alaska which, after [the date of enactment of this Act], are Federal lands" (16 U.S.C. 3102(3)). "Federal land[s]" is defined as "lands the title to which is in the United States after [the date of enactment of this Act]" (16 U.S.C. 3102(2)). Since the OCS is not "situated in Alaska" and does not constitute "lands the title to which is in the United States," it falls outside the statute on either account.

First, the OCS is plainly not, by its very terms, "situated in Alaska." The OCS is "seaward and outside of the area of lands beneath navigable waters" granted to the states by the Submerged Lands Act, 43 U.S.C. 1311, which is that portion of the continental shelf lying within three miles from the state's coast line (see 43 U.S.C. 1312; 43 U.S.C. 1331(a)). Portions of the OCS, including areas involved in Lease Sale 83, are located as far as 350 miles from Alaska's borders. Alaska's seaward boundaries, like those of other coastal states, do not include the OCS because they extend only to those lands conveyed by the Submerged Lands Act (see Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343).

Second, the OCS is not "federal land" as defined by the Act. ANILCA's definition of "federal lands" reflects the traditional notion that public lands are only those in which the United States holds formal "title." During the last four decades, however, Congress has deliberately and repeatedly declined to equate the federal government's interest in the OCS with formal title. The United States asserts only "sovereign rights [over the OCS] for the purpose of exploring and exploiting its natural resources" (Convention on the Continental Shelf, *done* Apr. 29, 1958, art. 2, para. 1, 15 U.S.T. 471, T.I.A.S. No. 5578, 499

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§ 10, 78 Stat. 985 (defining "public lands" for purposes of public land law review commission study as including OCS mineral resources interests); see also H.R. Rep. 1008, *supra*, at 10.

U.N.T.S. 311);[18] it does not claim "title or ownership in the conventional sense" (*United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); see also *United States* v. *Maine*, 420 U.S. 515, 517 (1975); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339-340 (5th Cir. 1978); see generally G. Coggins & C. Wilkinson, *Federal Public Land and Resources Law* 433-434 (1980) ("The various forms of jurisdiction and sovereignty that the United States has asserted over offshore areas do not amount to a claim of fee ownership of the underlying lands nor to an assumption of complete, exclusive jurisdiction over the waters.")).

Congressional enactments reflect this settled and carefully drawn characterization of the federal interest in the OCS. In the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, Congress carefully distinguished the "title" to the seabed granted to the states from the "jurisdiction and control" over the OCS retained by the federal government. See 43 U.S.C. 1302, 1311(a)(1), 1314(a). In the Outer Continental Shelf Lands Act of 1953, enacted just a few months later, Congress similarly avoided a formal claim of title and instead declared that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition" (Act of Aug. 7, 1953, ch. 345, § 3(a), 67 Stat. 462).[19] More recently, in 1978

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[18] The phrase "sovereign rights," like the phrase "jurisdiction and control" in the Truman Proclamation (see note 19, *infra*), is intended to distinguish the limited rights in the continental shelf from sovereign territorial claims. M. McDougal & W. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* 696-699 (1962).

[19] The origins of this characterization of the federal interest in the OCS no doubt lie with the Truman Proclamation of Sept. 28, 1945, in which President Truman declared that the "natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States * * * appertain[] * * * to the United States, subject to its juris-

during its comprehensive overhaul of the 1953 OCS legislation, Congress specifically rejected a finding included in the House-passed bill that would have declared "that OCS lands and resources are public property held in trust" (see H.R. Conf. Rep. 95-1474, 95th Cong., 2d Sess. 75 (1978)) and retained the more limited characterization of the federal interest in the OCS propounded in 1953 (see 43 U.S.C. 1332(1); H.R. Rep. 95-1474, *supra*, at 79). Finally, the Report of the House Committee on Merchant Marine and Fisheries on the 1985 OCSLA amendments (included in the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, §§ 8001-8005, 100 Stat. 147-151) authoritatively reaffirms this consistent view:

> The term "public lands" enjoys two centuries of well-established meaning as it has been used by the U.S. Congress and interpreted by the Supreme Court. Two fundamental criteria determine whether or not a land area constitutes public lands; the holding of title to the area and the ability to sell or otherwise dispose of it.
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> The U.S. does not hold title to the OCS, nor is the OCS subject to "sale or other disposition under general laws." As opposed to full dominion and control the U.S. has claimed only limited sovereignty over the exploration and development of the natural resources on and within the OCS.

H.R. Rep. 99-300, 99th Cong., 1st Sess. 591 (1985).

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diction and control." Pres. Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 comp.). In considering submerged lands legislation, Congress specifically noted that in its subsequent decision in *United States* v. *California*, 332 U.S. 19, 38-39 (1947), this Court, too, appeared to avoid the use of traditional ownership terminology in describing the federal government's interest in the continental shelf. See *ibid.*; S. Rep. 1592, 80th Cong., 2d Sess. 8 (1948), appended to S. Rep. 133, 83d Cong., 1st Sess. Pt. 1, at 57 (1953); see also *Outer Continental Shelf: Hearings on S. 1901 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 573 (1953) (testimony of Jack B. Tate, Deputy Legal Advisor, Department of State).

In the absence of any clear indication that Congress intended to depart abruptly from its otherwise uniform practice in the context of ANILCA (and we have found none),[20] it should not be assumed that Congress adopted

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[20] The sole reference to the OCS in ANILCA is contained in Section 1001 (16 U.S.C. 3141) which requires that the Secretary undertake a systematic interdisciplinary study of the North Slope of Alaska, including assessment of potential oil and gas development and wildlife resources. Section 1001(a) (16 U.S.C. 3141(a)), in particular, provides that:

> The Secretary shall initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska north of 68 degrees north latitude and east of the western boundary of the National Petroleum Reserve—Alaska, other than lands included in the National Petroleum Reserve—Alaska and in conservation system units established by this Act.

The parenthetical reference to the OCS does not, in our view, suggest that Congress believed that "Federal lands * * * in Alaska" would otherwise have included the OCS. The parenthetical may well have been inserted merely in an abundance of caution to ensure that references to the "North Slope," which in a related statute—the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719 *et seq.*—Congress had defined to include the Continental Shelf (see 15 U.S.C. 719b), would not be read so broadly in ANILCA. Notably, the Alaska Natural Gas Transportation Act was under consideration by some of the same congressional committees and enacted at approximately the same time that the early ANILCA legislation was being proposed and drafted. See S. Rep. 95-1300, 95th Cong., 2d Sess. 110-111, 112 (1978); H.R. Rep. 95-1045, 95th Cong., 2d Sess. Pt. 2, at 31-35 (1978); S. Rep. 94-1020, 95th Cong., 2d Sess. 12-13 (1976). (Note that the Senate Committee on Energy and Natural Resources is the relevant successor to the jurisdiction of the prior Committee on Interior and Insular Affairs.) That Section 1001 does not imply that the OCS is "public" or "federal" lands for the purposes of ANILCA is confirmed, moreover, by reference to Section 1008 (16 U.S.C. 3148). Section 1008(a) requires the Secretary to "establish, pursuant to the Mineral [Lands] Leasing Act of 1920, as amended [30 U.S.C. 181 *et seq.*], an oil and gas leasing program on the Federal lands of Alaska *not subject to the study required by [Section 1001]*" (16 U.S.C. 3148(a) (emphasis added)). Because the Mineral

a different view when it enacted ANILCA. Accordingly, in this respect as well, the definitional provisions of ANILCA exclude the OCS from Section 810's scope.

2. Although where, as in this case, the meaning of the statutory language is plain, that should be "the end of the matter" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)), the structure of ANILCA and its legislative history and background further corroborate the plain meaning of these definitional provisions. ANILCA was the third in a series of congressional enactments, commencing with the Alaska Statehood Act in 1958 and ANCSA in 1971, concerned with the allocation of "public lands" in Alaska. See S. Rep. 95-1300, 95th Cong., 2d Sess. 103, 108-109 (1978); H.R. Rep. 95-1045, 95th Cong., 2d Sess. Pt. 1, at 65-77, 189, 192-195, 222-223 (1978); see also H.R. Rep. 96-97, 96th Cong., 1st Sess. Pt. 2, at 153-172 (1979). In neither of those earlier laws, however, could Congress possibly have contemplated that the OCS would fall within the scope of public lands in Alaska. In the Statehood Act, Congress permitted the State of Alaska to select 102,550,000 acres of vacant and unreserved "public lands * * * in Alaska" within 25 years of its admission (Pub. L. No. 85-508, § 6(b), 72 Stat. 340). Similarly, ANCSA provided that Native Alaskans could select up to 40 million acres of certain "public lands" (43 U.S.C. 1611; see 43 U.S.C. 1610(a)), and "public lands" was defined as "all Federal lands * * * located in Alaska" (43 U.S.C. 1602(e)). It is inconceivable that Congress intended to allow either the State of Alaska or Native Alaskans to select portions of the OCS—"a vital national resource reserve held by the [government] for the public" (43 U.S.C. 1332(3)).[21] These provisions shed

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Lands Leasing Act does not apply to the OCS (see note 21, *infra*), Congress plainly did not assume that the term "Federal lands * * * in Alaska" would, absent a parenthetical exclusion, include the OCS.

[21] Notably, ANCSA requires that the Secretary survey and place monuments around any area selected by the Native Alaskans (see

further light on the meaning of "public lands" in ANILCA, the third in the series of related enactments. Cf. *Huddleston* v. *United States*, 415 U.S. 814, 326 (1974).

The structure of ANILCA further suggests that Congress did not intend, *sub silentio*, to expand the meaning of "public lands." For example, Section 810 itself places the duty to perform a subsistence evaluation on "the head of the Federal agency having primary jurisdiction over such lands" (16 U.S.C. 3120(a)). The statutory reference to "primary jurisdiction" was plainly drafted solely with onshore lands in mind. Although there are specific federal agencies with primary jurisdiction over traditional onshore public lands (see, *e.g.*, 30 U.S.C. 352; see also H.R. Rep. 95-1045, *supra*, Pt. 1, at 69), no such "primary jurisdiction" exists generally with respect to the OCS. Instead, agency jurisdiction over the OCS and the waters above turns on the particular activity at issue (*e.g.*, fishing, mineral leasing, navigation, pollution control). See G. Coggins & C. Wilkinson, *Federal Public Land and Resources Law* 434 (1980).

In addition, in enacting ANILCA Congress specifically considered, and rejected, a proposal to require that activities in the area six miles seaward of coastal refuges (which would include portions of the OCS) conform to plans developed to minimize harm to the coastal refuges. See H.R. Rep. 95-1045, *supra*, Pt. 2, at 5-8, 41, 74-76, 81; S. Rep. 95-1300, *supra*, at 149-150. That proposal was

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43 U.S.C. 1612)—a requirement irreconcilable with the proposition that the Natives might select a portion of the OCS. Cf. *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284-285 (1894). In addition, ANCSA provided the Secretary with 90 days to withdraw unreserved "public lands in Alaska" (43 U.S.C. 1616(d)(1)) in order to guard against "a land rush, in massive filings under the Mineral [Lands] Leasing Act [30 U.S.C. 181 *et seq.*]" (H.R. Conf. Rep. 92-746, 92d Cong., 1st Sess. 45 (1971))—a policy concern irrelevant to the OCS because the Mineral Lands Leasing Act is inapplicable (see 43 U.S.C. 1333(a)(1); *Justheim* v. *McKay*, 229 F.2d 29 (D.C. Cir.), cert. denied, 351 U.S. 933 (1956).

rejected because Congress "was concerned [about] the complexity of jurisdictions [that would result[] from such a designation of [seaward] areas" and concluded that the Secretary could accomplish the basic objectives of the designation under existing statutory authorities (S. Rep. 95-1300, *supra*, at 149-150; see also 124 Cong. Rec. 18025 (1978) (remarks of Sen. Stevens) (opposed to provision because ANILCA "intended to be a land bill."); S. Rep. 95-1300, *supra*, at 359 (Department of Commerce objections)). Identical concerns counsel against the addition of another layer of governmental regulation to OCS activities through Section 810. The OCSLA amendments of 1978, 43 U.S.C. 1331 *et seq.* Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. 1431 *et seq.*, Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, Fishery Conservation and Management Act, 16 U.S.C. 1801-1802, Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, all apply to activities on the OCS and supply the Secretary with ample authority to consider and protect subsistence resources affected by OCS activities. Indeed, prior to the court of appeals' ruling that Section 810 applied to Lease Sale 57, the Secretary considered the potential adverse impacts on subsistence resources as part of the NEPA planning process (see Sale 57 EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296). Having squarely rejected the coastal wildlife refuge "seaward areas" proposal, Congress can hardly be read as implicitly including in ANILCA an analogous statutory requirement regarding subsistence resources that suffers from the same deficiencies.

Finally, the entire thrust of congressional consideration of ANILCA, reflected throughout the legislative reports, hearings, and the legislative debates, supports the view that the OCS falls outside the scope of ANILCA. As described above, the purpose of ANILCA was to complete the three-step statutory process of achieving "a * * * reso-

lution of the status of [all the] public lands [in Alaska]." H.R. Rep. 95-1045, *supra*, Pt. 1, at 189; S. Rep. 95-1300, 95th Cong., 2d Sess. 103 (1978); see 16 U.S.C. 3101(d). The oft-repeated focus of this legislative effort was the allocation of the 375 million acres of lands and inland water areas within Alaska's formal boundaries (see, *e.g.*, H.R. Rep. 1045, *supra*, Pt. 1, at 65, 69, 192); the OCS's approximately 920 million acres off Alaska [22] (including 203 million acres of sedimentary basins), which were not included in that acreage, were simply not contemplated by anyone to be at issue (see, *e.g.*, 126 Cong. Rec. 18747 (1980) (remarks of Sen. Hart); 125 Cong. Rec. 11450 (1979) (remarks of Rep. Kostmayer); *id.* at 11129 (remarks of Rep. Udall); H.R. Rep. 96-97, 96th Cong., 1st Sess. Pt. 2, at 97 (1979) ("The State encompasses land and inland water areas of over 375 million acres and tide and offshore submerged lands encompassing some 37 million acres")).[23]

3. Respondents nonetheless argue, and the court of appeals held, that there is ambiguity in whether "public lands" includes the OCS and that, in light of that ambiguity and the rule of statutory construction favoring Indian tribal interests, Section 810 should be liberally construed in favor of the interests of Native Alaskans. As in *Escondido Mutual Water Co.* v. *La Jolla Indians*,

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[22] This estimate has been provided to us by the Department of the Interior.

[23] See also *Alaska National Interest Lands—Part 1: Hearings Before the Subcom. on Fisheries and Wildlife Conservation and the Environment of the House Comm. On Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 119-120, 329 (1979); *Alaska Lands —Part 2: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 449 (1978); *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings Before the Subcomm. on General Oversight and Alaska Lands, House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. 18-19, 30 (1977).

466 U.S. 765, 781 (1984), "[t]his effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive." None of the purported "ambiguities" suggested by respondents or the court of appeals casts any serious doubt on the conclusion that the OCS falls outside the scope of Section 810.

a. First, respondents argued below, and the court of appeals concluded (Pet. App. 58a-61a), that ambiguity is created because Section 4(b) of ANCSA (43 U.S.C. 1603 (b) (emphasis added)), which extinguishes "[a]ll aboriginal titles, if any, and claims of aboriginal title *in Alaska*," applies to the OCS and there is a "compelling argument that the provisions of [ANILCA] were intended to have the same territorial scope" (Pet. App. 59a). This contention fails, however, because no such "compelling argument" exists. Section 810 of ANILCA and Section 4(b) of ANSCA serve entirely different purposes: Section 4(b) concerns only Alaska Native interests and extinguishes aboriginal claims to all federal, state, and private lands; in contrast, Title VIII of ANILCA concerns all "rural residents" of Alaska (16 U.S.C. 3101(c)) and applies only to "public lands." Even more fundamentally, although the two provisions both use the language "in Alaska," only in Section 4(b) of ANCSA is that language explicitly supplemented by a reference to "submerged land underneath all water areas both inland and offshore" (43 U.S.C. 1603(b)). The absence of similar language in ANILCA reinforces the conclusion that Congress did not intend that Title VIII of ANILCA would apply to the OCS.

The court of appeals (Pet. App. 59a) placed substantial weight on the fact that the Senate version of ANCSA had included a provision that protected subsistence hunting and fishing, which was deleted in conference based on the expectation that "the Secretary and the State [would] take any action necessary to protect the subsistence needs of the natives." H.R. Conf. Rep. 92-746, 92d Cong., 1st Sess. 37 (1971). The legislative history of ANILCA Title VIII, moreover, reveals that

Congress included Title VIII partly because it believed that the federal and state governments had failed to take such necessary protective measures. See S. Rep. 96-413, 96th Cong., 1st Sess. 230-231 (1979); S. Rep. 95-1300, 95th Cong., 2d Sess. 195-196 (1978); H.R. Rep. 95-1045, *supra*, Pt. 1, at 183-184. Finally, the court of appeals noted that Title VIII reflects congressional intent to protect the opportunities for rural residents to maintain a subsistence way of life and that "reliance by coastal villagers upon hunting and fishing in [OCS] waters * * * was well known" (Pet. App. 60a).

The court of appeals' premises do not, however, support its conclusion. To be sure, Title VIII and ANCSA share certain common roots, but that hardly provides a basis for concluding that the geographic scopes of Section 4(b) of ANCSA and Section 810 of ANILCA are coextensive. As described above, their respective statutory purposes and statutory language both plainly suggest otherwise. ANILCA is not a comprehensive law designed generally to protect subsistence resources of importance to rural residents of Alaska. ANILCA is public lands legislation, of which Title VIII is but one part. There is no suggestion that Congress intended that the scope of Title VIII would somehow be broader than that of ANILCA as a whole.[24] ANILCA's definition of "public lands" applies to the entire statute, including Title VIII. Of course, Congress is free to enact broader legislation designed to protect subsistence resources, but neither respondents' desire that Congress do so nor the consideration that such additional legislation might arguably be logically symmetrical to ANCSA's extinguishment of aboriginal rights is a substitute for such an enactment. Cf. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1978) ("[t]he question * * * is not what a

[24] Notably, even the subsistence provision deleted from ANCSA applied (as the court of appeals acknowledged (Pet. App. 59a)) only to "public lands," which in ANCSA, as in ANILCA, does not encompass the OCS (see page 33, *supra*).

court thinks is generally appropriate to the regulatory process, it is what Congress intended").[25]

b. Second, respondents relied below (Pet. App. 58a) on several casual remarks by legislators during the debates to support their view that Congress used the term "in Alaska" in a "general," "[non]technical" sense. None of these isolated remarks, however, was specifically addressed to the question whether the OCS is "in Alaska" and, therefore, none has any direct bearing on that question. Respondents' reliance on these remarks to suggest

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[25] The court of appeals (Pet. App. 60a-61a) cited this Court's decisions in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110-116 (1949), and *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), as supporting a more expansive interpretation of Title VIII's geographical scope. Neither case supports respondents' cause. In *Hynes*, the Court considered a statute that authorized the Secretary of the Interior to designate as an Indian reservation in Alaska "any * * * public lands which are actually occupied by Indians or Eskimos within said Territory." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. The Secretary relied upon this grant of authority to extend the boundaries of an Indian reservation 3,000 feet from the shore line at mean low tide (337 U.S. at 90 n.1). The fishery thereby included in the reservation was "within [the] Territory" (which extended three miles offshore) and lay over land owned by the United States. Similarly, in *Alaska Fisheries*, at issue was whether a commercial fish trap constructed within 600 feet of the high tide line of an island was within "the body of lands known as Annette Islands," as described in a reservation created by an Act of Congress (248 U.S. at 87). This Court concluded that Congress, by referring to a group of islands "as a single body of lands," had intended the reservation to embrace "the intervening and surrounding waters as well as the upland" (*id.* at 89). The waters and submerged lands in that case were, however, "in the interior of the Alexander Archipelago" (*id.* at 88), "were the property of the United States[,] and [were] within a district where the entire dominion and sovereignty rested in the United States" (*id.* at 87). Unlike the lands and waters involved in these two cases, the OCS lies beyond the nation's three-mile territorial sea, and the United States does not claim title to it. These cases thus do not support construing "in Alaska" in ANILCA to include the OCS, parts of which extend more than 350 miles from the Alaskan coast.

ambiguity in the statutory terms is, accordingly, unpersuasive.

Indeed, when those remarks are considered in their broader context, they reflect the theme, reiterated throughout ANILCA's legislative history and inherently inconsistent with respondents' view, that ANILCA would *not* affect activities on the OCS. Each remark addressed the issue whether certain provisions of the bill would "lock up" areas (*i.e.*, exclude mineral development). For instance, Representative Udall, a key sponsor of the bill, argued that ANILCA would not prevent production of oil and gas on the OCS, which instead would be regulated by comprehensive OCS legislation then recently enacted by Congress:

> Let me tell you what is the result of our bill on Alaska. Most of the oil the experts will tell you is not on land in Alaska. Most of it is offshore. There are 203 million acres of sedimentary basins that have been identified offshore in Alaska.
>
> Let me tell you how much is locked up by this bill. The answer is zero. Under other legislation produced by my friend, the gentleman from New York (Mr. MURPHY) and which we all support, we now have in place good [OCS] legislation. Plans are going forward and all the offshore lands in Alaska where the majority of the oil is to be found are left open by this bill.

125 Cong. Rec. 11128 (1979); see also *id.* at 9900 ("Offshore in Alaska there are 203 million acres of sedimentary basin. Let me tell the Members how much of that is put out of production by this bill so that they cannot get it. The answer is zero.").[26] Comparable state-

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[26] The other statement principally relied on by respondents and the court of appeals (Pet. App. 58a), made by Representative Young of Alaska, who was a major opponent of the legislation, reflects a similar understanding of ANILCA's scope. Representative Young argued that supporting ANILCA was tantamount to "support[ing] offshore drilling in Alaska first over onshore drilling

ments by other legislators reveal a common understanding—consistent with the plain meaning of the statutory language—that ANILCA "has nothing to do with the Outer Continental Shelf" (125 Cong. Rec. 11170 (1979) (remarks of Rep. Emery); see 126 Cong. Rec. 21889 (1980) (remarks of Sen. Bayh) ("100 percent of the offshore sites would remain available to exploration"); *id.* at 21657 (remarks of Sen. Cranston) (same); *id.* at 18747 (remarks of Sen. Hart) ("most of Alaska's undiscovered oil and gas lies offshore, and so would not be affected by these land designations"); 125 Cong. Rec. 11450 (1979) (remarks of Rep. Kostmayer) ("Two hundred and five million acres offshore are untouched by the * * * bill"); see also 16 Weekly Comp. Pres. Doc. 2756 (Dec. 2, 1980) (remarks of President Carter on signing ANILCA into law) ("A hundred percent of the offshore areas * * * [with] potentially productive oil and mineral areas will be available for exploration or for drilling")).[27]

c. Finally, the court of appeals' "most compelling reason" for extending Section 810 to the OCS was that "Title VIII was adopted to benefit the Natives" and that ambiguities in the statute must be resolved in their favor (Pet. App. 62a). The court's (and respondents') reliance on the canon of statutory construction favoring the resolution of ambiguities in statutes in favor of Indians is, however, misplaced. "The canon of construction * * *

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* * * doing a great disservice to the environment" (125 Cong. Rec. 9907 (1979)).

[27] The court of appeals discounted the significance of these expressions of legislative intent on the ground that they "are not inconsistent with the position that Title VIII includes the [OCS] since nothing in Title VIII precludes oil and gas development in the areas to which it applies" (Pet. App. 63a). The common thrust of the statements is not, however, merely that OCS activities would not be "preclude[d]"; they reflect quite unambiguously the view that those activities have "nothing to do with [ANILCA]," "would not be affected," and would be "untouched by the" statute.

tion,"[46] the court of appeals held that the very application of such a balancing test was reversible error.

The Ninth Circuit stated that the plaintiffs did not need to demonstrate the existence of irreparable harm because " '[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.' " *Gambell II*, 774 F.2d at 1423 (A36). Moreover, any consideration of the harm that would befall others and their competing equities was held to be irrelevant. Instead, the "Ninth Circuit rule" was said to be that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances" where an injunction would interfere with a long-term contractual relationship or where it would do more environmental harm than good. 774 F.2d at 1423 (A38).

**A. The Ninth Circuit's *Per Se* Rule Is Directly Contrary to This Court's Holding in *Weinberger* v. *Romero-Barcelo* and to Traditional Equity Principles.**

In *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the district court had refused to enjoin the Navy's discharge of ordnance, despite its holding that the Navy was violating the Clean Water Act. The First Circuit mandated an injunction against future discharges, holding that the Clean Water Act required an injunction whenever a violation occurred. 456 U.S. at 310-11.

This Court reversed. It traced the long history of equity in the federal courts and emphasized that an injunction is an extraordinary remedy which requires a showing of irreparable harm, a balancing of the interests of the affected parties, and a regard for the public consequences of the

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[46] Such a finding is necessary when an appellate court reverses a district court's refusal to grant an injunction because it disagrees with fact-finding relevant to the fashioning of a decree. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982).

order. 456 U.S. at 311-13. While acknowledging that Congress can remove an equity court's discretion, this Court declined so to interpret the Clean Water Act because it did not evidence with sufficient clarity Congress' intention to take such extraordinary action:

> "[T]he comprehensiveness of this equitable discretion is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

456 U.S. at 313, quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). *See also*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944); *United States* v. *Rodgers*, 461 U.S. 677, 708 (1983); *Mitchell* v. *Robert DeMario Jewelry Inc.*, 361 U.S. 288, 291 (1960).

ANILCA does not limit the scope of equity courts' discretion to grant or to withhold relief regarding violations of Section 810. No provision of ANILCA specifies the remedies to be used for violations of that section.[47] Moreover, Section 810 gives no indication that it must be inflexibly enforced via a *per se* rule.[48] Thus, ANILCA does not constitute a "clear and valid legislative command" to the fed-

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[47] Section 807(a), which deals with violations of Section 804, states that a district court "*may* grant preliminary injunctive relief." 16 U.S.C. § 3117(a) (emphasis added).

[48] *Gambell I* itself recognized that the subsistence interests protected by ANILCA might ultimately yield when they conflict with OCS oil and gas development. 746 F.2d at 582 (A19-20). The Ninth Circuit simply ignored this holding when in *Gambell II* it asserted that "Congress has chosen the protection of subsistence life over oil exploration." 774 F.2d at 1426 n.2 (A43).

eral courts barring the exercise of their normal equitable powers in framing remedies for Section 810 violations.[49]

Rather than analyzing ANILCA from the perspective required by *Weinberger*, the Ninth Circuit simply declared that it had no relevance to this case because *Weinberger* "did not involve the tension between the requirements of [ANILCA] and [OCSLA]," and because it presented only a "narrow question" involving the Clean Water Act. *Gambell II*, 774 F.2d at 1426 n.2 (A42). This attempt to trivialize this Court's holding in *Weinberger* is obviously without merit.

This Court's wide-ranging discussion of equity practice in *Weinberger* shows that it involved more than interpretation of the Clean Water Act. 456 U.S. at 311. Moreover, this Court has on two occasions[50] and the other circuits have on numerous others[51] emphasized that *Weinberger* is

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[49] *Gambell II*'s *per se* rule was based on *TVA* v. *Hill*, 437 U.S. 153 (1978), where this Court held that Congress had limited the district court's discretion to refuse an injunction for a violation of Section 7 of the ESA. 774 F.2d at 1426 (A43). *Hill* has never been cited by this Court for the proposition that every violation of an environmental statute requires an injunction. Indeed, this Court noted in *Hill* that *Hecht* v. *Bowles* had held that, absent a very clear congressional command, a court's equity powers must be broadly construed. *Hill*, 437 U.S. at 193-94.

[50] In *United States* v. *Rodgers*, 461 U.S. at 708, this Court cited *Weinberger* for the proposition that "Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion." In *Park 'n Fly, Inc.* v. *Dollar Park and Fly*, 105 S. Ct. 658, 674 (1984) (dissenting opinion), Justice Stevens cited *Weinberger* for the principle that "injunctions do not issue as a matter of course," even though he dissented in *Weinberger*.

[51] *See, e.g., Greenwood Utilities Commission* v. *Hodel*, 764 F.2d 1459, 1462 (11th Cir. 1985); *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404, 416-17 (1st Cir. 1985); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 581 (7th Cir. 1985); *Sierra Club* v. *Army Corps of Engineers*, 701 F.2d 1011, 1039 (2d Cir. 1983); *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1333 (10th Cir. 1982).

to be given broad application. Only the Ninth Circuit has attempted to limit *Weinberger* to cases arising under the Clean Water Act.[52]

By misunderstanding *Weinberger* and erecting a *per se* rule, the Ninth Circuit committed three fundamental errors that are contrary to that decision and to long-enduring principles governing the award of equitable relief. First, the court of appeals abrogated the requirement that plaintiffs must show irreparable harm. This Court has repeatedly held that the basis for the extraordinary remedy of injunctive relief in the federal courts is harm that is irreparable because of the inadequacy of legal remedies. *Weinberger*, 456 U.S. at 312. This requirement may not be ignored merely because a statute has been violated. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-08 (1976); *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 506-07 (1959).

Second, the court of appeals' *per se* rule disregards the real irreparable harm that would have been suffered by the defendants if an injunction had issued. In the district court, the intervenor-defendants demonstrated that an injunction would result in the loss of $70 million in prior commitments made for exploration. (JA 25-55). Also, Interior argued and the district court found that an injunc-

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[52]Scholars have consistently given *Weinberger* the broad reading implicit in this Court's opinion. *See*, Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 121, 141-46 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 31 (1984); Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 Minn. L. Rev. 865, 878 (1983). *But cf.* Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982). However, even Plater's interpretation is broader than the one advanced by the Ninth Circuit, since he agrees that *Weinberger* allows district courts to authorize temporary noncompliance with a statute when, as here, future compliance is likely.

tion would cause irreparable harm to "this nation's quest for new oil resources and energy independence." (A62-63). These are countervailing equities that *Weinberger* and other cases insist be considered prior to the exercise of federal injunctive power. *Weinberger*, 456 U.S. at 312; *Hecht*, 321 U.S. at 329.

Third, the Ninth Circuit rule withdraws from the district courts their traditional discretionary power to balance the equities. The classic exposition of this role was set out by this Court in *Hecht*, 321 U.S. at 329-30:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. . . ."

The essence of equity has been the power of the Chancellor to mold each decree to the necessities of the particular case. Flexibility rather than rigidity is the rule. Thus, the award of an injunction has never been considered a matter of right, even when there is an undoubted violation of a statute or legal right. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). *See also*, *Weinberger*, 456 U.S. at 311; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946); *Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933); *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 359 (1933).[53]

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[53] The need for flexibility is especially great when, as here, the use of equitable powers will have great consequences for the public interest. *Yakus*, 321 U.S. at 440. Thus, this Court has stated that, when the public interest is implicated, "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.*, 328 U.S. at 398. *See also*, *Weinberger*, 456 U.S. at 312; *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937); *Railroad Commission* v. *Pullman*, 312 U.S. 496, 500 (1941).

**B. The Ninth Circuit's *Per Se* Rule Led to an Injunction that Will Not Remedy Past Violations but Will Instead Merely Punish Innocent Parties.**

The sole justification for a preliminary injunction is to prevent plaintiff from suffering irreparable harm pending a decision on the merits. *Sampson* v. *Murray*, 415 U.S. at 88; *Brown* v. *Chote*, 411 U.S. 524, 456 (1973). The sole justification for an injunction following a determination of the merits is to remedy the effects of the violation that a plaintiff has proved when there is no adequate redress at law. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 60; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring). Moreover, as this Court held in *Weinberger*, "the historic injunctive process was designed to deter, not to punish." 456 U.S. at 310 (quoting *Hecht*, 321 U.S. at 329-30).[54] The injunction mandated below violates all of these principles.

Plaintiffs suffered no tangible injury by virtue of Interior's decision to issue Sale Nos. 57 and 83 leases without complying with ANILCA in the manner deemed necessary by the Ninth Circuit. Moreover, the district court found that the conduct of exploration would itself not harm plaintiffs, and the court of appeals did not reverse that finding as an abuse of discretion. The only "harm" that the Ninth Circuit could identify flowing from a violation of ANILCA was the "irreparable damage" that the Ninth Circuit "presume[s] when an agency fails to evaluate thoroughly the environmental impact of a proposed action." 774 F.2d at 1423 (A36).

Even assuming *arguendo* that this type of abstract injury qualifies as "harm" for purposes of fashioning equi-

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[54] *See also, United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *Wallace* v. *Cutten*, 298 U.S. 229, 237-37 (1936).

table remedies,[55] it is clear that that harm occurred once and for all at the time the Sale Nos. 57 and 83 leases were issued. The decisions made by Interior to proceed with leasing in the Sale Nos. 57 and 83 areas without compliance with ANILCA cannot be undone by an injunction against exploration. Moreover, even if those decisions must be reconsidered, after full compliance with ANILCA, an injunction against exploration does nothing to facilitate that reconsideration. Thus, an injunction against exploration does nothing to address the "harm" which the Ninth Circuit declared that plaintiffs had suffered.

The only certain consequence of that injunction is that, had it been issued by the district court when it was initially sought by the plaintiffs, it would have imposed losses of at least $70 million upon industry petitioners, even though they were in no way responsible for the Department of the Interior's compliance with ANILCA. (JA 25-55). Punishment *per se* can never justify an injunction; *a fortiori* an injunction that imposes punishment upon innocent parties is invalid.

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[55] In *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983), the First Circuit advanced the theory that, because NEPA is meant to influence the decision-making process, the harm the Act is designed to avoid occurs whenever a decision is made without taking NEPA into account. This notion of abstract "procedural" harm has been questioned by other courts. *See, e.g., Wisconsin* v. *Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984); *United States* v. *162.20 Acres of Land*, 733 F.2d 377, 378 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985). Whatever its merit, this theory can justify an injunction only in circumstances, like *Massachusetts* v. *Watt*, where it is issued before the decision and thus preserves the opportunity of the federal agency to make a decision after compliance with the relevant statute. *Compare, Alaska* v. *Andrus*, 580 F.2d 465, 486 (D.C. Cir.), *vacated in part on other grounds as moot*, 439 U.S. 922 (1978), where the court refused to enjoin ongoing OCS exploration after discovering a leasing-stage NEPA violation which had occurred two years earlier.

## CONCLUSION

For all the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
*Petitioners,*

AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

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**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, which applies to public lands "in Alaska," extinguished Alaska Natives' aboriginal hunting and fishing rights outside the three-mile territorial limits of the State of Alaska?

2. Whether Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 *et seq.*, which applies to public lands "in Alaska," protects Alaska Natives' hunting and fishing rights outside the three-mile territorial limits of the State of Alaska?

3. Whether the United States holds title to the mineral resources of the Outer Continental Shelf so as to bring oil and gas leases under the Conservation Act's definition of "Federal lands"?

4. Whether Secretary Hodel can rely on post-sale evaluations to rationalize why Secretary Watt and Secretary Clark failed to comply with the mandates of Section 810 of the Conservation Act when holding OCS Lease Sales 57 and 83?

5. Whether Section 810 of the Conservation Act—which directs that certain studies and evaluations take place "[i]n determining whether to . . . lease" and which provides that "[n]o such . . . lease . . . which would significantly restrict subsistence uses shall be effected"—applies to leasing?

6. Whether an order enjoining exploration and development on tracts leased in violation of Section 810

of the Conservation Act was an appropriate remedy when the parties against whom the injunction issued had earlier represented to the court that the proper remedy for a violation of Section 810 was a permanent injunction rather than an order voiding the lease sales?

7. Whether an injunction is the appropriate remedy for a violation of a statute whose plain language and purposes can only be effectuated and implemented by immediate injunctive relief?

8. Whether the oil companies, in proceeding to bid at OCS Lease Sales 57 and 83, could justifiably rely on Interior's interpretation of the Conservation Act when they were party defendants in a lawsuit challenging that interpretation?

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## STATUTES

Relevant provisions of Title VIII of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3101 *et seq.* and the Alaska Native Claims Settlement Act (Claims Settlement Act), 43 U.S.C. § 1601 *et seq.* are reproduced in the appendix to this brief. (1a-4a).

## STATEMENT OF THE CASE

### A. INTRODUCTION

This case seeks to ensure that the statutory and common law protections for the hunting and fishing rights of Alaska's aboriginal people are applied fairly and consistently. The respondents are the tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti. The tribal villages of Gambell and Stebbins are federally recognized Indian Tribes.[1] The village of Gambell is located on St. Lawrence Island, an island situated near the Soviet Union in the Bering Sea. The village of Stebbins is located on the northeastern shore of the Yukon River Delta, an estuary bordering Norton Sound and the Bering Sea. Nunam Kitlutsisti is an intertribal organization representing 56 villages in the Yukon-Kuskokwim Delta. With a name literally translated from Yupik Eskimo as the "defender of life and land," Nunam Kitlutsisti has the mission of promoting and protecting the traditional hunting and fishing rights of its members.

This case concerns two Outer Continental Lease Sales: OCS Sale 57 and OCS Sale 83. OCS Sale 57 (Norton Sound) was held on March 15, 1983. The sale offered 429 oil and gas leases to 2.4 million acres of the OCS lying under the waters of Norton Sound. OCS Sale 83 (Navarin Basin) was held on March 16, 1984, about one year after the Norton Sale. It offered 3,700 oil and gas leases to

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[1] 51 Fed. Reg. 25,115 (July 10, 1986).

approximately 24 million acres of the OCS in the geologic formation called the Navarin Basin.

Unchanged from the date of filing in 1983, the legal claim advanced by the tribal villages is that Interior held both sales in either derogation of or wrongful reliance on one of two statutes which delimit the hunting and fishing rights of Alaska Natives. (JA 18). The two statutes are the Alaska Native Claims Settlement Act[2] and Title VIII of the Alaska National Interest Lands Conservation Act.[3] The Claims Settlement Act settled the aboriginal land claims of Alaska Natives, extinguishing in the process aboriginal title to lands situated "in Alaska." Part of the land claims settlement, Title VIII of the Conservation Act protects hunting and fishing on lands the title to which was extinguished by the Claims Settlement Act.[4] Both Acts apply to lands situated "in Alaska." Although they use precisely the same terms, relate to precisely the same subject matter, and are derived from a common document, Interior insists they should be construed inconsistently. Its position is that the Claims Settlement Act extinguishes aboriginal rights on the OCS but that the Conservation Act does not protect similar rights in the same area.

The tribal villages contend, and the court of appeals held, that this inconsistent position is contrary to the controlling language of the two statutes. The two statutes apply to the same geographic area. If neither the Claims Settlement Act nor the Conservation Act applies to the OCS, Alaska Natives retain their aboriginal rights, and oil exploration and development must proceed in a manner consistent with these claims as well as Interior's trust

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[2] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, *codified at* 43 U.S.C. § 1601 *et seq.*

[3] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. § 3101 *et seq.*

[4] D. Case, ALASKA NATIVES AND AMERICAN LAWS 299 (1984).

responsibility. Alternatively, if both statutes apply to the OCS, oil development on the OCS must proceed in a manner consistent with the procedural and substantive protections provided by Congress in the Conservation Act.

## B. THE IMPORTANCE OF SUBSISTENCE HUNTING AND FISHING RIGHTS

To fully appreciate why Congress could not have intended that the Conservation Act and the Claims Settlement Act be construed inconsistently, it is necessary to understand the importance of subsistence to the physical and cultural survival of Alaska's Native peoples. The hunting and fishing rights at issue in this case are critical to the well being of Alaska Natives. Although a life of fishing and hunting may be a quaint anachronism for an industrial society, cultural forces and lack of integration into the Western cash economy join together to make it the prime focus of life in rural Alaska.

Subsistence is loosely defined as the harvest of wild resources to provide food and raw materials for personal use, sharing, and distribution to kin, in accordance with established custom and tradition.[5] A cyclical process, it begins when Alaska Natives harvest fish and game. It continues as they directly consume it, share it, exchange it on local trade networks, or sell it for cash. Cash is then used to buy hunting and fishing equipment, with the process being completed when that equipment is used in further harvesting efforts.

Subsistence activities are central to the economy of western Alaska and the Bering Sea region.[6] Rural Native

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[5] See R. Little and L. Robbins, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: ST. LAWRENCE ISLAND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) [hereinafter Little and Robbins]. *See also* 16 U.S.C. § 3113 (defining "subsistence uses" for the purposes of the Conservation Act).

[6] See generally LITTLE AND ROBBINS, *supra* n. 5; A. Fienup-Riordan,

Alaskans have little access to the cash economy. Few can find jobs, for industry does not exist. Cash incomes must come from occasional wages, state or federal transfer payments, or a combined strategy in which one member of the family works while another hunts and fishes.[7] Living in rural Alaska is also expensive. The high cost of living is largely attributable to the high transportation costs of shipping over great distances in inclement weather.

The net result of low incomes and a high cost of living is poverty. Native Alaska constitutes a Third World within the United States. Many Native Alaskans are fluent only in their native tongue, and most live under conditions unknown elsewhere in the United States. The poverty here is broad and deep. In 1978, the per capita income in the Norton Sound region (Wade Hampton) was only 16% of the average United States per capita income.[8] In practice, this poverty translates into a lack of social amenities such as bathrooms, running water, and telephones.

Alaska Natives have traditionally relied upon subsistence hunting and fishing to overcome this lack of economic opportunity. The economic importance of these activities is illustrated by the fact that the value of food secured by subsistence hunting and fishing frequently exceeds cash incomes. In 1976, the annual value of a subsistence harvest for a family of four in western Alaska was $13,000. At the same time, the average cash income for the same family was approximately $5,263.[9]

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NAVARIN BASIN SOCIOCULTURAL SYSTEMS ANALYSIS, Alaska OCS Socioeconomic Studies Program, Technical Report No. 70 (January 1982).

[7] *See, e.g.*, State of Alaska House Research Agency, PERSONAL INCOME IN THE LOWER YUKON-KUSKOKWIM REGION (1982).

[8] U.S. Department of the Interior, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE 57, NORTON SOUND (1982) [hereinafter Norton FEIS] at Table III.B.4.-3.

[9] R. Wolfe, AN ECONOMIC ANALYSIS OF FOOD PRODUCTION IN A WESTERN ALASKA COMMUNITY 23 (1977).

In addition to its economic importance, subsistence hunting and fishing is central to the Eskimo's cultural survival. To an Eskimo, language, culture, spiritual beliefs, customs, and respect for others and for oneself are all tied into a holistic world-view centered around the traditional hunting, fishing, and gathering way of life. Critical life activities are centered on hunting, fishing, and sharing harvests with family and fellow villagers.[10] Because subsistence is crucial, disruptions of subsistence activities are likely to result in significant adverse changes in the cultural well-being and stability of western Alaska Native communities.[11]

## C. THE NATIVE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

Since subsistence hunting and fishing is so economically and culturally important to Alaska Natives, it is unsurprising that issues relating to these activities have been key elements in the two major statutes dealing with the rights of Alaska Natives, the Claims Settlement Act and Title VIII of the Conservation Act. As implied by its name, the Claims Settlement Act was a settlement between the United States and Alaska Natives. With the support of the Nixon administration, the oil industry, and Alaska Natives, it was passed to resolve land claims that threatened to block construction of the Trans-Alaska oil pipeline.[12] The terms of the settlement provided for an extinguishment of aboriginal claims in exchange for money, fee title to fewer lands, and protections for subsistence uses. The Act established thirteen regional corporations and various vil-

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[10] Norton FEIS, *supra* n. 8, at 48-49.

[11] LITTLE AND ROBBINS, *supra* n. 5, at Chapter XV; J. Jorgensen, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: NORTON SOUND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 90 (January 1984) [hereinafter JORGENSEN] at 327-354.

[12] J. Hanrahan and P. Gruenstein, LOST FRONTIER: THE MARKETING OF ALASKA 95 (1977)

lage corporations and awarded these corporations three major forms of compensation: money; royalties from oil, gas, and mineral leases; and 40 million acres of unallocated federal lands. 43 U.S.C. § 1601 *et seq.*

The Act did not, however, expressly protect subsistence uses. Although initial drafts included subsistence provisions,[13] the eventual agreement was based on the congressional representation that Interior and the State of Alaska would adequately protect those uses. To achieve this result, Congress instructed the Secretary of the Interior to provide for the subsistence needs of Alaska Natives.[14]

When Interior failed to heed this admonition, Congress was forced to act. 126 Cong. Rec. 29,278 (November 12, 1980) (statement of Representative Udall). Resurrecting language earlier deleted from drafts of the Claims Settlement Act,[15] it included in Title VIII of the Conservation Act systematic and comprehensive protections for subsistence hunting and fishing. With respect to the disposition of public lands, the Act declares that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence. . . ." 16 U.S.C. § 3112(1). It further declares that all leasing must allow, to the maximum extent possible, "the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.* To achieve these ends, Section 810 requires land managers to carefully evaluate the impact of leasing on subsistence uses and resources, and to identify alternative land selections before making any leasing decisions. 16 U.S.C. § 3120(a). For leasing that might significantly restrict subsistence activities, the land

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[13] *E.g.*, S. 3859, 90th Cong., 2d Sess. (1968); S. 1830, 91st Cong., 1st Sess. (April 15, 1969); S. 35, 92d Cong., 1st Sess. (1971).

[14] Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250.

[15] *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120(a).

manager, before issuing any leases, must ensure that: (1) the restriction is necessary; (2) the leasing involves the minimal amount of public land; and (3) reasonable steps will be taken to minimize adverse impacts on subsistence uses. 16 U.S.C. § 3120(a)(1)-(3).

Congress ensured that the Conservation Act would apply to all lands affected by the Claims Settlement Act. The Conservation Act covers all conceivable federal rights, placing "lands, waters, and interests therein" under its umbrage. 16 U.S.C. § 3102(1). The geographic coverage is similarly broad. Mirroring and applying co-extensively with the Claims Settlement Act from which it was derived, the Conservation Act protects all federal lands "in Alaska." 16 U.S.C. § 3102(3).

## D. INTERIOR'S INCONSISTENT IMPLEMENTATION OF THE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

After Congress passed the Conservation Act in 1980, Alaska Natives hoped that Interior would develop the lands to which aboriginal title had been extinguished in a manner consonant with their subsistence uses. The need for careful development was evident with respect to OCS leasing. Interior predicted that OCS leasing would directly reduce subsistence harvests by killing some percentage of the fish and wildlife taken for subsistence purposes. It further predicted that OCS leasing would substantially increase the human population over a short period of time. This population increase would place additional pressure on existing stocks of fish and game, introduce significant inflation into the subsistence economy, and rend the social fabric. Interior indicated that a sale as modest as Norton Sound would lead to an increase in crime, suicide, alcoholism, drug abuse, venereal disease, and poverty.[16]

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[16] NORTON FEIS, *supra* n. 8, at 46-47, 134-35.

Despite the compelling case for a studied consideration of subsistence uses and needs, Secretary Watt made clear he would pay them no heed. His attitude was illustrated by his reaction to suggestions that OCS leasing might seriously disrupt the subsistence activities of Alaska Natives. Responding to these concerns, he cavalierly insisted that "35,000 people on the edge of the world" would not influence his plans to lease the Alaskan OCS.[17]

In practice, his refusal to consider subsistence users when conducting OCS leasing was expressed in an inconsistent application of Title VIII and Section 4(b) of the Claims Settlement Act. The inconsistency originated in *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ___U.S.___, 106 S. Ct. 68 (1985) (*Inupiat Community*). There, Inupiat Eskimo asserted aboriginal title to OCS lands which they had traditionally used and occupied. To defeat these claims, Secretary Watt took the position that the Claims Settlement Act abolished aboriginal hunting and fishing rights outside the territorial waters of the State of Alaska. He argued that a technical interpretation restricting the term "in Alaska" to the territorial sea would be "tortured." The oil companies, also parties in that case, alleged that the phrase was geographically descriptive and that such a use was "a perfectly natural one."

After adopting the position that the Claims Act applied to the OCS, Secretary Watt then took precisely the opposite position with respect to Title VIII. His theory for ignoring Title VIII was premised on the assumption that the Conservation Act could not be interpreted as applying beyond the State's territorial waters. Without holding hearings or otherwise opening the administrative process to public comment, Secretary Watt concluded that the term "in Alaska" did not include the OCS.

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[17] The Wall Street Journal, March 12, 1986, at 64.

## E. *GAMBELL I* AND *GAMBELL II* COMPEL INTERIOR TO CONSISTENTLY IMPLEMENT THE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

The tribal villages of Gambell and Stebbins called into question Interior's attempt to create a gap in the protections for the subsistence uses of Alaska Natives when they filed this case on March 4, 1983. Their claim was that the term "in Alaska" had to be construed consistently. As used in two sister statutes—the Claims Settlement Act and Title VIII of the Conservation Act—the term was either geographically or technically descriptive. If geographically descriptive, Title VIII applied to OCS leasing. If technically descriptive, Alaska Natives retained their aboriginal rights beyond the marginal sea because such rights had not been extinguished by the Claims Settlement Act.

The suit forced Interior to justify an inconsistent application of an identical term in two sister statutes. The resulting response lacked grace. Before the tribal villages filed *Gambell I*,[18] Secretary Watt and the oil companies had contended in *Inupiat Community* that the phrase "in Alaska" referred to an area lying beyond the high tide mark. After *Gambell I* was filed, they contended that the phrase could not possibly have that meaning, and that it described a limited geographic area lying inside the marginal sea. The oil companies, largely conceding that the Claims Settlement Act did not apply to the OCS, argued that paramount federal authority abolished aboriginal title. Secretary Watt, conceding that the statutes were vague, contended that their geographic scope had to be resolved by their legislative history. That history, he further argued, demonstrated that Congress intended for the two sister statutes to apply to totally different areas.

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[18] *Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1974) (Fed. Pet. App. 44a).

The Court of Appeals for the Ninth Circuit rejected these claims, holding that the term "in Alaska" had the same meaning in the sister statutes. Eschewing the alternative of reading the term technically, it held that the phrase was geographically descriptive, encompassing areas outside as well as inside the territorial waters of the State.[19] It determined that the Claims Settlement Act extinguished Native hunting and fishing rights outside the three-mile limit and that Title VIII of the Conservation Act protected similar rights in the same area. *Gambell I*, 746 F.2d at 579, 582.

The court of appeals did not, however, void the sale as requested by the tribal villages. It refused this request at the urging of both the Secretary and the oil companies. To avoid having the sale voided, the Secretary and the oil companies conceded that should the court find that the Conservation Act applied to OCS leasing, the tribal villages would be entitled to an injunction. *See Gambell I*, 746 F.2d at 582; *Village of Gambell v. Hodel*, 774 F.2d 1414, 1417 (9th Cir. 1985) (*Gambell II*). Accordingly, the court of appeals remanded the matter to the district court for the limited purpose of deciding whether the sale should be voided or whether further activities should be permanently enjoined. *Gambell I*, 746 F.2d at 582-83.

In spite of their representation to the *Gambell I* court that an injunction was the proper remedy, the Secretary and the oil companies reversed their position on remand and argued that an injunction was not an appropriate remedy. They claimed that Interior had fully and completely, albeit indirectly, complied with the Conservation Act when following the mandates of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* To buttress this claim, they submitted a post-sale evaluation purporting to

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[19] *See Gambell I*, 746 F.2d at 573; *Inupiat Community*, 746 F.2d at 571.

fulfill all the statutory requirements of the Conservation Act. Published about a month after the tribal villages had moved for a preliminary injunction, the document asserted that leasing Norton Sound would not significantly restrict subsistence uses. (Fed. Pet. App. 81a).

The district court rejected the inadvertent compliance argument but failed to issue the preliminary injunction. Expressing a natural skepticism that the Secretary could "inadvertently comply" with the Conservation Act, it judged that the Secretary had violated the statute on a number of counts. Chief among the violations were the Secretary's failure to prepare subsistence studies for the two challenged lease sales with the precepts of the Act clearly in mind and his failure to give the notice, hold the hearings, and make the findings required by Section 810(a)(1)-(3) of the Conservation Act. Nevertheless, the district court failed to enter the injunction requested by the tribal villages. Without explaining its reason or rationale, and without expressly balancing the equities, it summarily concluded that an injunction was not an appropriate remedy in the case. (Fed. Pet. App. 37a-43a).

The court of appeals reversed. Noting that Interior and the oil companies had previously represented to it that an injunction was the appropriate remedy, it determined that the district court erred in not granting the tribal villages this relief. *Gambell II*, 774 F.2d at 1416-17. The court of appeals based its decision on traditional equitable principles as well as its finding that injunctive relief was the only available remedy for leasing in violation of the Conservation Act. Following this decision, Interior and the oil companies petitioned for a writ of certiorari on issues presented by both *Gambell I* and *Gambell II*. The tribal villages cross-petitioned on the issue of whether the Claims Settlement Act extinguished aboriginal title to the OCS. The Court granted Interior's and the oil companies' petitions. It took no action on the villages' cross-petition.

## SUMMARY OF ARGUMENT

Alaska Natives hold aboriginal title to portions of the OCS or, as the court of appeals found, the Conservation Act protects their subsistence uses on all OCS lands.

I. Alaska Natives hold aboriginal title to portions of the OCS. Federal common law as well as the Outer Continental Shelf Lands Act recognize the prior possessory interests of Alaska Natives to offshore ice and water areas which they have traditionally used and occupied. These aboriginal claims survived the passage of the Claims Settlement Act because that Act does not contain the plain and unambiguous language needed to extinguish them. Accorded all the respect due a fee simple interest, these possessory interests preclude development of the off-shore lands they encumber.

II. Title VIII of the Conservation Act applies to the OCS in the event the Claims Settlement Act is construed as extinguishing aboriginal title to that area. Alaska Natives agreed to the passage of the Claims Settlement Act based on the representation that their subsistence uses on affected lands would be protected. Title VIII fulfills that promise. In language taken from a draft of the Claims Settlement Act, it applies to precisely the same lands and waters as does the Claims Settlement Act. If the Claims Settlement Act applies to the OCS, so does the Conservation Act.

III. If the Conservation Act applies to the OCS, Interior must comply with Section 810 before leasing public lands. The plain language of the statute dictates that compliance precede leasing. The legislative history and purposes of the Act also support Section 810's application at the lease sale stage.

IV. An injunction is the appropriate remedy for violations of Section 810. Traditional equitable principles—the probability of success on the merits, the balance of hard-

ships, and the public interest—favor the grant of injunctive relief. The plain language of the statute requires one. Section 810 represents a congressional determination that leasing decisions cannot be made, and leases cannot be issued, until Interior has fully complied with procedures designed to incorporate subsistence needs into all leasing decisions. The only available remedies for a violation of Section 810 are an order voiding the sale or an order enjoining exploration until the Secretary achieves compliance, if that is possible as a factual matter.

V. Finally, the claim that Section 810 should not be retroactively applied to the Norton and Navarin Basin Sales, even if the Act generally applies to OCS leasing, must be rejected on factual grounds. The record demonstrates that this case does not involve a retroactive application of the Conservation Act.

## ARGUMENT

### I. ALASKA NATIVES HOLD ABORIGINAL TITLE TO PORTIONS OF THE OCS.

The court of appeals found that the Claims Settlement Act extinguished aboriginal title to the ice and waters traditionally used and occupied by Alaska Natives. This decision is irreproachable to the extent it consistently applies the Claims Settlement Act and Title VIII. If the Claims Settlement Act applies to OCS lands and waters, so does the Conservation Act. Yet the obverse of this proposition is equally true. If the Conservation Act does not apply to OCS lands and waters, neither does the Claims Settlement Act. In this case Alaska Natives hold aboriginal title to OCS lands they have traditionally used and occupied.

The law of aboriginal title was originally developed by Chief Justice John Marshall in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). That decision found that when European governments "discovered" the United States, they asserted paramount sovereignty to this land, obtain-

ing a fee title good against all other European governments. 21 U.S. (8 Wheat.) at 572-79. But their title was not free of all encumbrances. The original Natives retained possessory interests by virtue of their use and occupancy—a right which has generally been described as "original Indian title," "aboriginal Indian title," or "Indian title."

Marshall reasoned that the legal rights conferred by aboriginal title flowed from these general principles. Because aboriginal title was an encumbrance on the sovereign's fee, it could only be transferred with the consent of the sovereign. Moreover, while aboriginal title was good against all third parties, it could be extinguished at will by the sovereign holding the fee. Finally, where the federal government was sovereign, aboriginal title was presumed valid unless specifically extinguished. 21 U.S. (8 Wheat.) at 591-92; *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 1251 (1985).

Later cases developed the principle that federal law does not countenance penumbra extinguishments of aboriginal title. Because aboriginal title can be summarily extinguished, this Court has required that Congress unambiguously exercise its termination powers. It has held that congressional intent to extinguish Indian title "must be plain and unambiguous" as well as that a congressional decision to terminate aboriginal rights "cannot be lightly implied." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346, 354 (1941). *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Pigeon River Co. v. Charles W. Cox Ltd.*, 291 U.S. 138, 160 (1934).

This Court has also held that aboriginal title appertains to interests in waters and submerged lands. The principle that Indians can hold title to interests in navigable streams and waters was first announced in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where Justice Marshall found

that the Cherokee Nation held navigation rights to the Tennessee River. Four later cases affirm this decision, each finding that Native groups can hold aboriginal title to fishing rights in navigable waters. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *Carter v. Hawaii*, 200 U.S. 255 (1906); *United States v. Winans*, 198 U.S. 371 (1905); *Damon v. Hawaii*, 194 U.S. 154 (1904).

Related cases provide that aboriginal use of water establishes title to the associated submerged lands. *Montana v. United States*, 450 U.S. 544, 550 at n.1 (1981). *See Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Resolving competing tribal and state claims to submerged lands, these cases decide whether exceptional circumstances overcome the strong presumption that the United States does not convey an ownership interest in submerged lands held in trust for the states pursuant to the "equal footing" doctrine and applicable principles of constitutional law. *See Oregon ex. rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Although each of these cases ultimately disposes of the tribal claims differently, depending on their individual facts, they collectively find that aboriginal use of navigable waters by Native tribes and bands gives rise to aboriginal title claims to the associated submerged lands.

These principles find that Alaska Natives hold aboriginal title to those portions of the Alaskan OCS which have served as their traditional hunting and fishing grounds. No aboriginal group has used the coastal water and ice as extensively as the Eskimo. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, permitting the Eskimo to treat the ice as land. They set up camps on the ice. They build roads on it. And, most importantly,

they hunt and fish on it.[20] In addition, the Eskimo have traditionally secured the majority of their resources from ice and water. Because the tundra is largely devoid of natural resources, the Eskimo have traditionally relied on the sea for food, clothing, fuel, and the basic materials for making hunting equipment such as kayaks and harpoons.[21] As a result of their profound reliance on the sea, the Eskimo do not sharply distinguish between land and water. As put by one commentator:

> The use of coastal ice and water by Alaska's Native people is remarkable—greater than their use of land in some major areas. Beyond the quantity of their use, their methods of use were exceptional. Whether it was Eskimo use of ice in the North, Aleut use of water on the Chain, or Tlingit activity on the fjords of the South, lives were so centered on the water that the lines which we imagine separate land from water disappeared.

K. Josephson, ALASKA AND THE LAW OF THE SEA: USE OF THE SEA BY ALASKA NATIVES—A HISTORICAL PERSPECTIVE 91 (1974).

This use and occupancy gives rise to cognizable claims to coastal lands and water. This Court has previously recognized that Alaska Natives hold aboriginal title to areas they have traditionally used and occupied. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). For almost half a century Interior has taken the position that this title extends to all waters and submerged lands over which the United States asserts sovereignty. *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461 (1942). Based on precedent issued by this Court, this controlling authority flatly holds that the use of coastal ice and water "estab-

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[20] R. Nelson, HUNTERS OF THE NORTHERN ICE (1969).

[21] *Id.*; N. Chance, THE ESKIMO OF NORTH ALASKA 9 (1966)

lishes possessory rights in Alaskan waters and submerged lands." 57 Interior Dec. 461, 476.

The United States recognized these possessory rights when it extended paramount sovereignty over the OCS. In 1953 the federal government enacted the OCSLA, asserting jurisdiction and control over the OCS, and claiming title to all mineral interests in those lands. But this extension of federal power did not secure to the United States unfettered rights and interests. Pursuant to the principles of international and federal common law announced by Chief Justice Marshall in *Johnson v. McIntosh*, Alaska Natives retained a subordinate possessory interest based on their prior occupancy and use. This principle is expressly recognized by the OCSLA. The Act states that it does not "affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to" its provisions. 43 U.S.C. § 1342. Confirming this plain language, the accompanying legislative history states that this savings clause applies to rights, such as aboriginal title, which were recognized as a matter of federal law and policy after the United States acquired sovereign control pursuant to the doctrine of discovery. The House Report makes this point as follows:

> [The Act] asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, *such lands and resources are subject to the doctrine of discovery. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires, as a matter of policy and law, that the property rights of individuals in and to such lands and resources be recognized and confirmed.*

H.R. Rep. No. 695, 82d Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Ad. News 1395, 1411 (emphasis added).

These aboriginal claims to coastal waters and submerged lands were not extinguished when Congress passed the Claims Settlement Act in 1971. To abolish aboriginal title, Congress must consciously decide to terminate that subordinate interest, consciously address the nature and scope of the termination, and then craft a statute whose language plainly and unambiguously expresses its decisions. The Claims Settlement Act fails this test. It contains no language "plainly and unambiguously" extinguishing aboriginal title on the OCS. The Act merely terminates Indian title to lands "situated in Alaska," a phrase susceptible of two interpretations. Used in a technical sense, it describes the area lying within the territorial boundaries of the State of Alaska. Used in a geographical sense, it describes the area lying outside as well as inside the marginal sea. Both senses are natural, and, *a priori*, no reason exists to prefer one to another.

Nor does the legislative history of the Claims Settlement Act "plainly and unambiguously" indicate that Congress intended to extinguish these possessory interests. The great weight of that history indicates that the Act does not apply to the OCS. Committee Reports on the bill repeatedly state that the extinguished aboriginal claims were intended to apply "to the lands which now comprise the State of Alaska." *E.g.*, S. Rep. No. 925, 91st Cong., 2d Sess. 46, 47 (1970); H.R. Rep. No. 523, 92d Cong., 1st Sess. (1971). During consideration of the bill, members of Congress, as well as a representative from Interior, consistently expressed the belief that it only extinguished aboriginal claims to "the entire State of Alaska," or a maximum of "375 million acres [of Alaska]."[22] No one voiced the opinion that

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[22] *E.g., Alaska Native Land Claims: Hearings Before the House Subcommittee on Indian Affairs on H.R. 3100, et al.*, 92d Cong. 1st Sess.

the Act would apply to anything other than lands lying within Alaska's territorial boundaries.

In the face of this overwhelming authority to the contrary, the court of appeals concluded that the Claims Settlement Act applied to the OCS. It reached this conclusion largely on the basis of a single inconsequential sentence uttered by an oil industry spokesman at a Senate hearing held two years before a different Congress passed the Claims Settlement Act. An early draft of the Claims Settlement Act extinguished "aboriginal right, title, use, or occupancy of lands *in Alaska*." S. 1830, 91st Cong., 1st Sess. § 3(a) (April 15, 1969); H.R. 10193, 91st Cong., 1st Sess. § 3(a) (1969). Before both a House Subcommittee and a Senate Committee, a representative of the oil industry proposed amending the phrase to read "lands, waters, and submerged areas in Alaska."[23] On its face this amendment did not affect the geographic scope of the extinguishment, for the phrase "submerged areas" was limited by the following prepositional phrase "in Alaska." In comments to the Senate Committee (not to the House Subcommittee), the industry spokesman mentioned, by way of background, that the State of Alaska owned submerged land and that the federal government "held title" to the OCS. *1969 Senate Claims Settlement Hearings* at 140. Two years later a different Congress enacted Section 4(b) of the Claims Settlement Act, a section which extinguishes

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(1971) at 370 (statement of Harrison Loesch, Assistant Secretary of the Interior), 65 (statement of Rep. Aspinall), and 340 (statement of Rep. Begich). *See also, e.g.*, 117 Cong. Rec. 36,854 (1971) (statement of Rep. Aspinall); 117 Cong. Rec. 38,443 (1971) (statement of Sen. McGovern); 117 Cong. Rec. 38,445 (1971) (statement of Sen. Harris).

[23] *Alaska Native Land Claims: Hearings Before Senate Committee on Interior and Insular Affairs on S. 1830*, 91st Cong., 1st Sess. at 149 (1969) [hereinafter *1969 Senate Claims Settlement Hearings*]; *Alaska Native Land Claims: Hearings Before the House Subcommittee on Indian Affairs on H.R. 13142 and H.R. 10193*, 91st Cong., 1st Sess., Part I, at 318 (1969).

"All aboriginal title in Alaska . . . including submerged land . . . both inland and offshore." 43 U.S.C. § 1603(b). The court of appeals found that this passing reference to the OCS in the Senate hearing indicated a congressional intent to apply the Claims Settlement Act to that area.

The court of appeals erred in reaching this conclusion. The strongest proposition supported by the legislative history is that Congress might have extinguished aboriginal title to OCS lands had it considered the issue. The oil industry would have favored extinguishing all Native claims, and this proclivity might have been shared by those federal officials responsible for developing federal lands. Moreover, those Alaska Natives represented by former Chief Justice Arthur Goldberg indicated a willingness to entertain proposals that included extinguishing all rights based on aboriginal title. *See 1969 Senate Claims Settlement Hearings* at 301. Yet this idle speculation cannot substitute for a plain and unambiguous expression of congressional intent. The invariant and prevailing rule is that Congress must "plainly and unambiguously" express its intent to extinguish aboriginal claims. If it neglects a particular claim when passing termination legislation, the resulting legislation cannot be construed as extinguishing that right. The parameters of the extinguishment are set by the congressional selection of the claims to be terminated, not by the penumbra cast by those selections.

For wholly different but equally compelling reasons, aboriginal title to OCS lands and waters is not extinguished by the exercise of paramount federal sovereignty. The "paramountcy" argument hopelessly confuses the controlling law of aboriginal title. Assertions of paramount federal sovereignty complement rather than conflict with aboriginal title claims. Derived from prior occupancy, aboriginal title is a federally-recognized right which is never negated by paramount federal power. *E.g.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 486-93 (1982 ed.). Decisions issued by this Court illustrate precisely this point. Although

the federal government exercised complete (rather than paramount) sovereignty as well as ownership over the territories which later became the western states, aboriginal title was fully protected on these lands. Those possessory claims survived statehood and were found to have been extinguished only by treaty or an act of Congress specifically terminating them. *E.g., United States v. Shoshone Tribe*, 304 U.S. 111, 117-18 (1938).

Since Alaska Natives hold aboriginal title to coastal areas which they have traditionally used and occupied, Interior is precluded from leasing areas subject to these encumbrances. "Considered as sacred as the fee simple of whites," the aboriginal title of Alaska Natives is entitled to the same protection offered a fee simple interest. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). Until such time as Congress extinguishes aboriginal title to the Alaskan OCS, Interior can neither disrupt the hunting and fishing activities of Alaska Natives nor lease lands to which they claim title. *Jones v. Meehan*, 175 U.S. 1 (1899). In the meantime, it must limit leasing to those substantial areas not historically used by Alaska's Native peoples.

## II. TITLE VIII OF THE CONSERVATION ACT APPLIES TO THE OCS IN THE EVENT THE CLAIMS SETTLEMENT ACT EXTINGUISHED ABORIGINAL TITLE TO OCS LANDS AND WATERS.

The history and purposes of Title VIII demonstrate that it applies to the same lands and waters as does the Claims Settlement Act. Alaska Natives agreed to have Congress extinguish their aboriginal claims based on the understanding that their subsistence uses on affected lands would be protected. If the Claims Settlement Act applies to the OCS, so does Title VIII.

This conclusion is appropriate in light of the canon of statutory construction governing interpretations of Title VIII. This Court has consistently held that ambiguities in statutes passed for the benefit of indigenous people must

be resolved in favor of those people. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). This canon is fully applicable to the Conservation Act. Not only is Title VIII of the Conservation Act Indian legislation, its legislative history reveals a congressional intent that this canon control the resolution of controversies arising from its implementation. Representative Udall, the chief sponsor of the Conservation Act, explained this intent just prior to the final House vote adopting the Conservation Act:

> While the [Conservation Act] obviously is not Indian legislation in its entirety, the subsistence title and the other subsistence related provisions are. And under well-recognized canons of statutory construction, any ambiguities in the title and other provisions must be resolved in favor of the Alaska Native people.

126 Cong. Rec. 29,279 (November 12, 1980).

While acknowledging that Title VIII of the Conservation Act is inextricably linked to the Claims Settlement Act, the Secretary and the oil companies contend that the two statutes should be construed inconsistently. They claim that the Conservation Act does not apply to OCS oil and gas leases because those interests do not fall within the Act's definition of "Federal lands" or "Public lands."

**A. Oil And Gas Leases In The OCS Are "Federal Lands." The United States Unquestionably Holds Title To These "Interests," And The Congress Asserts Title To OCS Lands For Purposes Of Domestic Legislation, In The Conservation Act As Elsewhere.**

The claim that oil and gas leases do not fall within the purview of the definition of "Federal lands," presented

neither in *Gambell I* nor *Gambell II*,[24] depends on a suppression of the most pertinent portion of that statutory definition. The Secretary and the oil companies correctly argue that Section 102(2) of the Conservation Act defines "Federal lands" as "lands the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2). They further argue, again correctly, that the term "Public lands" is defined as "lands situated in Alaska which, after December 2, 1980, are Federal lands." 16 U.S.C. § 3102(3). Here they stop. Either by design or oversight, they neglect to mention that the statute defines "lands" broadly, sweeping within its ambit *"interests"* in lands and waters. Distinguishing and differentiating between lands and "interests" in lands, Section 102(1) of the Conservation Act defines "lands" as "lands, waters, *and interests therein.*" 16 U.S.C. § 3102(1) (emphasis added).

Section 102(1)'s definition of "lands" establishes that oil and gas leases are "Federal lands." When read together, Sections 102(1) and 102(2) provide that "interests to which the United States holds title" are included within the definition of "Federal lands." Oil and gas leases to OCS lands are unquestionably interests to which the United States holds title. The word "title" merely connotes an ownership right. *E.g.*, BLACK'S LAW DICTIONARY. All relevant authority provides that the United States owns the mineral resources of the Outer Continental Shelf. The most pertinent of these is the OCSLA. That Act provides that the subsoil and seabed of the OCS are subject to the United States' jurisdiction, control, and disposition. 43 U.S.C. § 1332(1). It further provides that the OCS is a "vital national resource reserve" that is "held" by the United States. 43 U.S.C. § 1332(3). This ownership has been lu-

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[24] Since neither the Secretary nor the oil companies raised this issue in the court of appeals, the tribal villages are puzzled as to why they argue it here. *E.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

crative: since the OCSLA's implementation in 1953, the United States has received over $70 billion in royalties and bonuses from oil and gas leasing on the Shelf.[25] *See also* H.R. Rep. No. 590, 95th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1450, 1461 ("The lands of the Outer Continental Shelf . . . *belong* to the Federal Government") (emphasis added); *1969 Senate Claims Settlement Hearings* at 140 (oil industry claim that United States "holds title" to the OCS).

Moreover, OCS oil and gas leases would be "Federal lands" even if the statutory definition did not include "interests" in lands. Congress routinely asserts that the United States holds title to the OCS for purposes of domestic legislation, ignoring the legal niceties which surround the status of the United States' dominion over the OCS in the international arena. Two examples of this congressional treatment of OCS lands can be found in the Federal Lands Policy and Management Act (FLPMA) and the Archaeological Resource Protection Act (ARPA). FLPMA, like the Conservation Act, defines the term "public lands." By specifically excluding OCS lands from the class of lands owned by the United States, it indicates that, for purposes of domestic legislation, Congress treats the OCS as though it were owned in a conventional sense. FLPMA provides that: "Public lands means: *Any land and interest in land owned by the United States . . . except:* (1) *lands located on the Outer Continental Shelf;* and (2) lands held for the benefit of Indians, Aleuts, and Eskimos." 43 U.S.C. § 1702(e) (emphasis added).

The Archaeological Resource Protection Act provides yet another example of this congressional treatment of OCS lands. Like the Conservation Act, the ARPA defines "public lands" as those lands the fee title to which is held by the United States. Yet unlike the Conservation Act, the

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[25] Pendley, *Development of the Exclusive Economic Zone*, Vol. 2, No. 1, A.B.A. NATURAL RESOURCES & ENVIRONMENT 29 (1986).

ARPA excepts OCS lands from this definition. Illustrating once again that Congress routinely assumes that the United States holds title to the Outer Continental Shelf, as well as that Congress possesses the capacity to exempt the Outer Continental Shelf from the workings of a statute when it so desires, the ARPA defines "public lands" as:

> (A) lands which are owned and administered by the United States as part of—(i) the national park system, (ii) the national wildlife refuge system, or (iii) the national forest system; and
>
> (B) all other lands *the fee title to which is held by the United States, other than lands on the Outer Continental Shelf* . . .

16 U.S.C. 470bb(3) (emphasis added).

While these examples suggest that Congress no doubt understood that the Conservation Act's definition of "Federal lands" included the OCS, the Conservation Act itself provides compelling evidence that this was indeed the congressional understanding. The proof is provided by Section 1001. 16 U.S.C. § 3141. Section 102's definition of federal lands is generally important only for Title VIII, for the geographic scope of other titles generally does not depend on this definition. The scopes of these titles are controlled by other sections of the United States Code, are established by maps, or, as in the cases of Titles IX and XIV, are expressly not dependent upon Section 102's definition. Section 1001 is an exception to this rule. It uses Section 102's definition, plainly providing that "Federal lands" include OCS lands. It states:

> The Secretary shall initiate and carry out a study of *all Federal lands (other than submerged lands on the Outer Continental Shelf)* in Alaska north of 68 degrees north latitude. . . .

16 U.S.C. § 3141(a) (emphasis added). By specifically excepting OCS lands from the definition of "Federal lands,"

Section 1001 compels the conclusion that OCS lands are "Federal lands" for Conservation Act purposes.

**B. Oil And Gas Leases In The OCS Are "Public Lands" If The Claims Settlement Act Extinguished Aboriginal Title To The OCS: The Language Of The Two Statutes Is Virtually Identical, And Title VIII Was Expressly Intended To Apply To All Lands Affected By The Claims Settlement Act.**

After finding that the Claims Settlement Act applied to the OCS, the court of appeals found that the Conservation Act likewise applied to this area. Its conclusion was based largely on the legislative history of the Conservation Act, which showed that the definition of public lands was intended to cover all lands to which the Claims Settlement Act extinguished title.

The Claims Settlement Act contained no provisions protecting subsistence uses. The initial drafts of the Act embodied the framework of the eventual settlement: the extinguishment of aboriginal title in exchange for money, fee title to fewer lands, and protections for subsistence uses.[26] Although none of the subsistence provisions were adopted, their rejection did not reflect congressional indifference. The Conference Committee represented that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. To prod Interior into action, the Committee directed "both the Secretary and the State to *take any action necessary* to protect the subsistence needs of the Natives." *Id.* (emphasis added).

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[26] *See, e.g.*, S. 3859, 90th Cong., 2d Sess. (1968); H.R. 13142, 91st Cong., 1st Sess. (1969); S. 1830, 91st Cong., 1st Sess. (April 15, 1969); S.35, 92d Cong., 1st Sess. (1971); S. 835, 92d Cong., 1st Sess. (1971); H.R. 7039, 92d Cong., 1st Sess. (1971).

Congress did, however, address subsistence when it acted to meet its 1978 deadline for settling the legal status of 80 million acres of public lands in Alaska. The deadline was set by Section 17(d)(2) of the Claims Settlement Act. 43 U.S.C. § 1616(d)(2). That statute directed the Secretary of the Interior to withdraw up to 80 million acres of public lands—known as D-2 lands—and to recommend inclusion of these lands in National Parks, Forests, Wildlife Refuges, and Wild and Scenic River Systems. It then gave Congress five years to confirm these recommendations. Representative Udall introduced a D-2 lands bill pursuant to these provisions in 1977. H.R. 39, 95th Cong., 1st Sess. (January 4, 1977). The bill designated lands as D-2 conservation units and provided some rudimentary protections for subsistence uses on those lands.

Alaska Natives found that the proposed bill did not adequately protect subsistence uses. Pointing out that Interior had failed to provide the protections promised by the Claims Settlement Act Conference Report, they objected to the substance as well as the geographic scope of the legislation. To remedy its substantive inadequacies, the Alaska Federation of Natives (AFN) and other Native groups advocated strengthening the subsistence provisions. AFN proposed adding provisions which Congress had previously deleted from the Claims Settlement Act.[27] Since Interior had failed to adequately provide for subsistence uses, Congress proved receptive to the proposal. It ultimately incorporated many of its provisions—including what is now Section 810—in Title VIII. *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120(a).

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[27] *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic River Systems: Hearings on H.R. 39 et al. Before the Subcommittee on General Oversight and Alaska Lands*, 95th Cong., 1st Sess., Part XII at 52-56, 461-75, 489-97 (1977) [hereinafter 1977 House Alaska Lands Hearings].

Alaska Natives also advocated extending the geographic scope of the subsistence title. The subsistence title of the initial D-2 legislation only applied to the lands withdrawn by other sections of the bill. Alaska Natives objected to this limitation, contending that the subsistence title should confirm the subsistence rights guaranteed them in the Conference Report accompanying the Claims Settlement Act. The AFN's position was that, in order to fulfill its obligations under the Claims Settlement Act, Congress had to apply the subsistence title to all lands to which that Act had extinguished title. Mr. Byron Mallot, speaking for AFN, testified that:

> The Alaska Federation of Natives believes this legislation should confirm the subsistence rights of the Alaska Natives, not just to the D-2 lands, but, as Congress plainly intended when it wrote its [Claims Settlement Act] conference report, to all Native subsistence *uses on all Federal public lands*. . . .

*1977 House Alaska Lands Hearings*, Part XII at 53, 463 (emphasis added).

The AFN proposed amending the D-2 legislation so that the geographic scope of the subsistence title was severed from the geographic scope of the D-2 titles. The mechanism for severing the subsistence title from the D-2 titles was a proposed definition of "public lands." Borrowing language directly from the Claims Settlement Act, the AFN proposed defining public lands as "all Federal lands and interests therein situated in Alaska." *Id.* at 491. *See* 43 U.S.C. § 1602(e). It further proposed extending the geographic scope of the subsistence title to all "public lands." *1977 House Alaska Lands Hearings* at 53, 463. Under its amendments, the D-2 withdrawals would continue to be described by maps, but the subsistence title would apply to all public lands traditionally used by Alaska

Natives for subsistence purposes prior to the passage of the Claims Settlement Act.[28]

The Subcommittee which had received Mr. Mallot's testimony responded swiftly to the AFN's amendment. It passed out of committee legislation incorporating the proposals in early 1978. H.R. 39, 95th Cong., 1st Sess. (Feb. 15, 1978). The legislation severed the subsistence title from the D-2 titles and extended the geographic scope of the subsistence title to all public lands. As suggested by the AFN proposal, these changes were effectuated by adopting AFN's definition of "public lands." *Id.* at Sec. 103. As demonstrated by the following comparison, the AFN definition of "public lands" became Section 102(2):

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[28] The oil companies allege that the AFN subsistence proposal did not include the OCS because it only applied to public lands "located within the exterior boundaries of each of the twelve regional corporations." The argument actually establishes that Title VIII applies to the OCS, since Congress rejected this limitation and extended the subsistence protections to all public lands. Its relevance is otherwise obscure. The boundaries of the regional corporations were commonly understood to include the OCS. (R-44 (Norton) Exhibit I). Moreover, the AFN proposed legislation is unclear as to whether the restrictive phrase "included within the exterior boundaries of each of the twelve regional corporations" applied to public lands or merely to Native lands. The plain language suggests the limitation applied only to the latter.

| AFN Proposal | 16 U.S.C. § 3102(3) |
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| "Public Lands" means all Federal lands and interests therein situated in Alaska as of the effective date of this Act, except: . . . (2) land selections of the State of Alaska which have been patented or tentatively approved . . . (3) land selections made under ANCSA and not yet conveyed by the Secretary to an ANCSA corporation, unless determined to be invalid, and (4) lands covered by ANCSA section 19(b). | The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except— (A) land selections of the State of Alaska which have been tentatively approved or validly selected . . . (b) land selections of a Native Corporation made under [ANCSA] which have not been conveyed to a Native corporation, unless any such selection is determined to be invalid . . . and (C) lands referred to in section 19(b) of [ANCSA]. |

The adoption of the AFN's definition ensured that the geographic scope of Title VIII is congruent with that of the Claims Settlement Act. The definition was proposed for the express purpose of protecting subsistence uses on all federal lands to which the Claims Settlement Act had extinguished title. Its language is drawn directly from that Act, for it, like the Claims Settlement Act, defines public lands as "all Federal lands and interests therein situated in Alaska." *Compare* 16 U.S.C. § 3102(1)-(3) *with* 43 U.S.C. § 1602(e). In light of the amendment's express purpose and plain language, its acceptance unquestionably demonstrates that Congress intended to apply the subsistence title of the Conservation Act to all lands affected by the Claims Settlement Act.

Although the legislative history of the Conservation Act does not speak directly to this point, the congressional response to AFN's "public lands" definition strongly sug-

gests that Congress understood that the definition extended the geographic scope of the subsistence title to the OCS. As soon as Congress adopted AFN's definition of public lands, it amended the Conservation Act's savings clause to include the Fishery Conservation and Management Act of 1976. *Compare* H.R. 39, § 701(g), 95th Cong., 1st Sess. (October 12, 1977) *with* H.R. 39, § 716(4), 95th Cong., 2d Sess. (October 15, 1978). With very few exceptions, the Fishery Management Act applies to waters lying between three and two hundred miles offshore. 16 U.S.C. §§ 1801, 1811-12. The Conservation Act could not affect the Fishery Management Act unless it applied beyond the territorial sea. Congress had found no reason to include the Fishery Management Act in the Conservation Act's savings clause before the geographic scope of the subsistence title was extended to all public lands. Its decision to add the Fishery Management Act to the savings clause immediately after adopting AFN's definition of public lands is consistent with a congressional understanding that the term included lands and waters lying outside the boundaries of the marginal sea.

Other pertinent legislative history indicates that the sponsors of the Conservation Act fully understood that the geographic scope of the subsistence title differed from that of the D-2 titles. While the geographic scope of Title VIII was set by the definition of public lands, the coverage of the D-2 titles was delineated by individual maps specifying the lands to be withdrawn. These maps rarely included portions of the OCS. *See, e.g.*, National Wildlife Refuges in Alaska; Description of Boundaries, 48 Fed. Reg. 7,890, 8,017 (February 24, 1983). As evidenced by the numerous comments cited by the Secretary and the oil companies, supporters of the D-2 lands bill continually assured Congress that the D-2 titles would not affect OCS leasing. *See Fed. Pet. Brief* at 40-41. In every instance the representations as to the limited geographic scope of the bill referred to the D-2 titles. In no instance did any member

of Congress make a similar representation as to the scope of Title VIII, though they presumably had the incentive to do so. Their silence evidences a congressional understanding that the subsistence title applied to OCS leasing.

In fact, statements concerning the geographic scope of the D-2 land withdrawals, made during the floor debates, indicate that the prevailing impression was that the term "in Alaska" was geographically descriptive and included the OCS. This understanding was expressed by Representative Udall, the chief sponsor of the Conservation Act, who remarked that "Offshore in Alaska there are 203 million acres of sedimentary basin." 125 Cong. Rec. 9,900 (1979). His use of the term was echoed by Representative Young of Alaska, a member of the House Interior Committee and its Subcommittee on General Oversight and Alaska Lands. Mr. Young also indicated that "in Alaska" extended to offshore waters, stating that "The person who supports offshore drilling in Alaska first over onshore drilling is doing a great disservice to the environment." 125 Cong. Rec. 9,907 (1979). *See also* 126 Cong. Rec. 11,124 (1980) (Senator Cranston) ("we can still meet our need to develop oil and gas in Alaska").

In this regard, the proposition that "in Alaska" would be used most naturally in its geographically descriptive sense is established by the fact that Interior and the oil companies have previously espoused exactly that position. To defeat aboriginal claims to the OCS in the *Inupiat Community* case, both claimed that the term included the OCS. Interior ventured that interpreting the term as only including the territorial sea would be "tortured." The oil companies were more eloquent. They argued:

> Plaintiffs' [the Inupiat Communities'] insistence (p. 65) that the words "in Alaska" in ANCSA be read in their most narrow possible sense is betrayed by their own habitual use in other contexts of the same phrase encompassing the areas

> they claim [the Outer Continental Shelf]. . . . On plaintiffs' own theory as to the restricted meaning of the phrase, all these authorities, and many more, are irrelevant to their claims. *But the less guarded usage, both by plaintiffs and by Congress in ANCSA, is a perfectly natural one.*

*Memorandum in Support of Motion of Defendants AMOCO Production Co. for Judgment on the Pleadings* at 102 (emphasis added). This argument is as applicable to the Conservation Act as it is to the Claims Settlement Act. If it was "perfectly natural" for Congress to use the term "in Alaska" in a geographically descriptive sense when it passed the Claims Settlement Act, it was "perfectly natural" for Congress to use the word in the same sense when it passed the Conservation Act some nine years later.

## III. THE SECRETARY MUST COMPLY WITH SECTION 810 BEFORE LEASING PUBLIC LANDS.

The court of appeals correctly determined that Section 810's language and legislative history required that the Secretary comply with Section 810 before leasing public lands. The requirements of Section 810(a) are set out in two sentences. The first applies before any leasing decisions are made. It requires that the Secretary prepare baseline as well as impact studies, and that he consider alternatives which would reduce or eliminate the need to lease. The second sentence precludes the issuance of any lease which would significantly restrict subsistence uses until he gives notice, holds hearings, and makes the findings required by Section 810(a)(1)-(3).

The Secretary and the oil companies concede that Interior violated the first sentence of Section 810(a) and contend that it need not comply with the second. They base this latter claim on two documents which were prepared after the court of appeals decided *Gambell I* and which were published after the tribal villages subsequently moved for a preliminary injunction. Legal justifications

rather than analyses, the post-sale evaluations find that not one of more than 3700 oil and gas leases to 26.4 million acres of OCS lands triggered the notice, hearing, and findings required by the second sentence of Section 810(a). (Fed. Pet. App. 81a, 107a). The argument is that the second sentence does not apply at the lease sale stage due to the uncertainties of oil and gas exploration and the lack of direct physical impacts attributable to leasing. Under this theory, since Interior can only conclude that a lease "would [in fact] significantly restrict" subsistence uses after exploration proves that the tract contains commercially exploitable quantities of oil and gas, the Secretary need never comply with Section 810(a) at the lease sale stage. *Id.*

As an initial matter, Interior's post-sale evaluations must be rejected on scientific grounds because they are based on inadequate and unreliable information. Since the Secretary and the oil companies concede that Interior failed to prepare adequate baseline and impact studies,[29] they

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[29] Neither the Secretary nor the oil companies has petitioned for review of the lower courts' determination that Interior violated the first sentence of Section 810 when holding the Norton and Navarin sales. In the courts below, the Secretary and the oil companies claimed that Interior had "inadvertently complied" with the first sentence. Alleging that the Conservation Act required no more than that demanded by the NEPA and the OCSLA, they contended that compliance with these statutes assured compliance with the Conservation Act. Both courts rejected this claim on legal grounds, reasoning that since the Conservation Act was intended to supplement existing statutes, it could not be interpreted as demanding less. (Fed. Pet. App. 37a-38a; 9a-12a). The courts also could have rejected the argument on factual grounds. The record demonstrates that Interior failed to complete the studies and perform the analyses contemplated by the first sentence of Section 810 with respect to both sales. For example, at the time Lease Sale 57 was held, no baseline information regarding subsistence uses in Norton Sound was available. Comprehensive subsistence baseline studies of Native subsistence villages in Norton Sound and the Bering Sea areas were not published until January and June of 1984, more than

cannot credibly argue that the post-sale evaluations are accurate. The validity of the post-sale evaluations depends upon reliable subsistence impact studies. If the subsistence impact studies are inadequate, Interior's post-sale evaluations must likewise be inadequate.

The court of appeals did not reach this adequacy question because it ignored the post-sale evaluations. Its treatment of the documents fully comports with applicable principles of administrative law. Prior decisions of this Court teach that Secretary Hodel cannot rely on post-sale evaluations to rationalize why Secretary Watt and Secretary Clark failed to comply with the mandates of Section 810. This Court has long held that "a simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962), *quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Administrative actions must be supported by contemporaneous explanations. They cannot be justified by litigation documents which serve as *post-hoc* rationalizations for actions which are otherwise unlawful. *Camp v. Pitts*, 411 U.S. 138, 142-3 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971). Applied here, this rule precludes Interior from using post-sale evaluations to advance new and different reasons justifying why Secretary Watt and Secretary Clark refused to comply with the second sentence of Section 810 when holding the Norton Sound and Navarin Basin lease sales.

Finally, assuming that the post-sale evaluations are part of the administrative record—which clearly they are not—their conclusions that Section 810 does not apply to leasing

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a year after the sale. *See* JORGENSEN, *supra* n. 11; LITTLE AND ROBBINS, *supra* n. 5.

should be rejected for the reason that they conflict with Section 810's language and purposes. The language of Section 810(a) is particularly compelling on this point. Its use of the word "lease" removes all doubt that it applies to leasing. The second sentence provides:

> *No such . . . lease . . . which would significantly restrict subsistence uses shall be effected until* the head of such Federal agency [gives notice, holds hearings and] determines that (A) such a significant restriction of subsistence uses is necessary, . . . (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

16 U.S.C. § 3120(a)(1)-(3) (emphasis added).

The rationale of *Secretary of the Interior v. California*, 464 U.S. 312 (1984), holds that the congressional decision to insert the word "lease" in Section 810(a) indicates that Congress intended for that section to apply at the lease sale stage. In *Secretary of the Interior*, this Court decided that Section 307(C)(1) of the Coastal Zone Management Act did not require Interior to make a consistency determination at the lease sale stage. 464 U.S. at 315. Its holding was based on the fact that the CZMA did not contain the word "lease" or "leasing," and that its legislative history showed that Congress had explicitly rejected attempts to put those words into Section 307(C)(1). *Id.* at 332-35. The logic of this decision mandates that the second sentence of Section 810(a) be interpreted as applying to leasing. If the critical factor is the word "lease," then the congressional decision to insert "lease" in Section 810(a) evidences a plain congressional intent to have that Section apply at the lease sale stage.

Contrary to the suggestion of the Secretary and the oil companies, the word "would" in the phrase "would significantly restrict" does not dictate a different result. "Would" is a modal auxiliary which has nearly two dozen different meanings, among which are "futurity," "uncertainty," and "probability." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981). Its meaning, in Section 810 as elsewhere, depends on the surrounding context.[30] For purposes of Section 810, this context is provided by the subject and predicate phrases "No such . . . lease . . . shall be effected." This language requires that "would" be given its natural and preferred meaning of "futurity." The Secretary claims he can never know whether a given lease "would in fact" significantly restrict subsistence uses. If "would" is interpreted to mean "would in fact," then the congressional directive that "No lease shall be effected" has no practical consequence. This is an impossible result. Congress used the word "lease" because it intended for Section 810(a) to apply to leasing decisions. Its intent cannot be wholly frustrated by a strained reliance on one of several equally probable uses of a modal auxiliary.

In this regard, the correct standard for determining when the Secretary must undertake the compliance effort envisioned by the second sentence of Section 810(a) is supplied by a host of court of appeals' decisions interpreting virtually identical language in the National Environmental Policy Act. The NEPA requires an environmental impact

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[30] The Court's decision in *INS v. Stevic*, 467 U.S. 407 (1984), stands for precisely this proposition. That case resolved whether the Refugee Act of 1980 changed the standard for deportation proceedings under the Immigration and Nationality Act (INA) from a clear-probability-of-persecution standard to a well-founded-fear-of-persecution standard. Although this Court noted in passing that the use of the word "would" in the INA suggested a probability, it based its holding solely on the context supplied by the surrounding words in the statute and the legislative history of the Refugee Act of 1980. It found no evidence of congressional intent to change the prevailing standard.

statement for all major federal actions "significantly affecting" the qualify of the human environment. 42 U.S.C. § 4332(2)(C). The courts of appeals have rejected arguments that the phrase "actions significantly affecting" means only those actions which "will in fact" significantly affect the human environment. They have held that when substantial questions are raised as to whether a project will have this effect, the agency must prepare an EIS. *E.g., Quinonez-Lopez v. Coco Lagoon Development Corp.*, 733 F.2d 1, 2 (1st Cir. 1984); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1177-1178 (9th Cir. 1982). Since the NEPA's "significantly affecting" language connotes a higher level of certainty than Section 810's "would significantly restrict" language, this substantial question test sets a minimum standard for determining when the Secretary must comply with the second sentence of Section 810(a).[31]

Finally, the purposes of the Conservation Act demand that the second sentence of 810(a) be interpreted to apply at the lease sale stage. By enacting Title VIII of the Conservation Act, Congress sought to ensure that public land

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[31] The express language of section 810 strongly suggests that Congress intended that the standard for the "significant restriction" determination in Section 810 be triggered at least as easily as the parallel finding of "significant impact" under NEPA. It provides that whenever NEPA requires the Secretary to prepare an EIS he must give the notice, hold the hearings, and make the findings required by section 810(a)(1)-(3). It states:

> If the Secretary is required to prepare an environmental impact statement pursuant to [NEPA], he *shall* provide the notice and hearing and include the findings required by subsection (a) of this section as part of such [EIS].

16 U.S.C. § 3120(b) (emphasis added).

decisions "cause the least adverse impact possible" on Alaska Natives who depend on subsistence. 16 U.S.C. § 3112(1). It also wanted to ensure that management decisions affecting public lands be calculated to allow, to the maximum extent possible, the opportunity for rural residents engaged in a subsistence way of life to do so. *Id.*; 16 U.S.C. § 3111(5). Congress further sought to ensure that "rural residents who have personal knowledge of local conditions and [subsistence] requirements . . . have a meaningful role" in management decisions affecting fish and wildlife and the subsistence uses of those resources. 16 U.S.C. § 3111(5); § 3112(3); § 3115; § 3120 (a)(1)-(3).

These purposes can only be achieved if the second sentence of section 810 applies at the lease sale stage. Leasing is a critical stage in the OCS development process. Tract selections determine where exploration, development, and production will occur as well as which areas will be exposed to oil spills. Stipulations influence the flow of vessel traffic, the placement of platforms and drilling structures, and the location of on-shore construction facilities. Stipulations also dictate what equipment can be used and what training must be provided by lessees. Moreover, leasing constitutes an irrevocable commitment of resources. Although the Secretary retains broad control over exploration, development, and production activities under the OCSLA, once leases are sold, large sums of money change hands and extensive exploration projects are undertaken. As the First Circuit has recognized, "[e]ach of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). The commitment is legal as well as bureaucratic. The OCSLA empowers the Secretary to cancel leases. But it does not authorize cancellation of leases on the basis of potential restrictions to subsistence uses. *See, e.g.*, 43 U.S.C. § 1334(a)(2)(A). Assuming that it did, the possibility of the Secretary actually taking such a step is

remote in light of the fact that cancellation would entitle the lessee to substantial compensation. 43 U.S.C. § 1334(a)(2)(C).

The critical nature of the lease sale stage requires that the second sentence of Section 810 apply at that stage. In the context of decisions involving the disposition of public lands in Alaska, Section 810's purposes are effectuated through the notice, hearings, and findings required by Section 810(a). Since the Secretary retains absolute and unfettered discretion over OCS development only at the lease sale stage, these requirements must be met at that stage if the purposes of the Act are to be fully implemented. Only at the lease sale stage can subsistence users become meaningfully involved in the decision-making process. Only at the lease sale stage can subsistence values be incorporated into the planning process. And only at the lease sale stage can the Secretary ensure that his proposed management decisions will cause "the least adverse impact possible" or that the "minimum amount of public lands" are leased. For this is the time when the Secretary possesses full authority to refuse to act where the benefits to be gained, though substantial, are outweighed by the risk of a significant restriction to subsistence uses.

## IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT EXPLORATORY ACTIVITIES ON PUBLIC LANDS LEASED IN VIOLATION OF THE CONSERVATION ACT SHOULD BE ENJOINED.

After concluding in *Gambell I* that the Conservation Act applied to the Secretary's OCS leasing program, the court of appeals remanded this case to the district court for a determination as to whether the Norton Sound sale should be voided or whether exploration and development activities should be permanently enjoined until such time as the Secretary complied with the mandates of the Conservation Act. This order was a victory for Interior and the oil companies. The tribal villages had strenuously argued,

to both the motions and merits panel in *Gambell I*, that the only appropriate remedy for a violation of Section 810 was an order voiding the sale. *Gambell I*, 746 F.2d at 582. To avoid this result, Secretary Watt and the oil companies had represented that an injunction was the appropriate remedy. Both had argued that the proper remedy "would be the same as that ordered in *California v. Watt*: to enjoin further activities until the Secretary completes the procedures required by the statute." *Brief of ARCO Alaska* at 47-50; *Brief of Fed. Appellees* at 47-49. (To avoid discussion, relevant portions of these briefs are reproduced in their entirety in the appendix at 5a, 6a).

Having represented to the court that an injunction was the appropriate remedy for a violation of Section 810, Interior and the oil companies now claim that the court of appeals erred in reaching this conclusion. They argue that it ordered this remedy only because it applied a *per se* rule requiring the issuance of an injunction for every Section 810 violation. They further allege that the application of this alleged *per se* rule violates this Court's holding in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

Whether the court of appeals relied on a *per se* rule in this case is subject to question. On the one hand, its opinion expressly finds that the district court misapplied traditional equitable principles. *Gambell II*, 774 F.2d at 1416. On the other hand, when discussing the public interest, it suggests that, absent unusual circumstances, a refusal to enjoin a continuing violation of Section 810 would be an abuse of discretion. *Id.* at 1424-25. The difference is academic. The court of appeals would have been justified in finding either that traditional equitable principles required the issuance of injunctive relief under the special facts and circumstances of this case or that the Secretary's failure to comply with Section 810 warranted injunctive relief except under unusual circumstances.

### A. The Tribal Villages Are Entitled To Injunctive Relief Under Traditional Equitable Principles.

Traditional equitable principles find that the tribal villages were entitled to injunctive relief. They were certain of success on the merits. The balance of hardships tipped decidedly in their favor. The public interest weighed heavily in favor of the injunction.

The balance of hardships unquestionably tipped in favor of the tribal villages, for neither the Secretary nor the oil companies demonstrated that they would suffer any irreparable harm if the injunction issued. In the Secretary's case this conclusion was axiomatic. Tacitly conceding that the government would suffer no harm if the courts authorized injunctive relief, the Secretary never alleged that the issuance of an injunction would irreparably harm any governmental proprietary interest. *Gambell II*, 774 F.2d at 1424-25. The conclusion was only slightly less compelling in the oil companies' case. Before the court of appeals, the oil companies' principal claim of harm was that, if the injunction issued, they would suffer financial losses attributable to the disruption of contracts signed after the court of appeals decided *Gambell I*. *Id.* at 1427. The harm was not judicially cognizable. A party cannot alter the balance of hardships by bootstrapping itself into a position of harm. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 767-70 (1983); *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1256 (9th Cir. 1984) (*en banc*). Once the oil companies had notice of the business risks inherent in proceeding with exploration in the face of the Secretary's violation of the Conservation Act, their assumption of the risk could not alter the previously existing balance of hardships.[32]

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[32] The same reasoning precludes claims of financial losses attributable to the purchases of the leases since, as demonstrated at pages 49-50 *infra*, the oil companies were fully informed as to the risks inherent in proceeding with both sales.

In contrast, the tribal villages established that they would suffer irreparable harm should the injunction not issue. This Court has long recognized that violations of statutory prohibitions are judicially cognizable harms which must be considered in determining whether injunctive relief is appropriate. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (1982); *TVA v. Hill*, 437 U.S. 153, 193-95 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *United States v. San Francisco*, 310 U.S. 16, 30-31 (1940). *See* Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982). This harm is present here, for Interior's violations of Section 810 "poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact Section 810." *Gambell II*, 774 F.2d at 1424. Moreover, exploratory drilling and its associated activities pose real and significant dangers to the fish and wildlife forming the basis of the villages' subsistence economy. As demonstrated by Interior's own studies, noise attributable to airplanes, ships, and other mechanized traffic could effect reductions in the populations of whales, seals, walrus, and birds inhabiting the Norton Sound Basin.[33] As further demonstrated by these studies, oil spills attributable to exploratory drilling could prove devastating for Alaskan villages extremely dependent upon the subsistence economy.[34] Indeed, it was these

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[33] NORTON FEIS, *supra* n. 8, at 167-69, 177-80, 184-85.

[34] Interior forecast three major oil spills during the exploration and development stages and predicted that at least one would be of catastrophic proportions. NORTON FEIS, *supra* n. 8, at Table IV.A.4.b-1, 109. An oil spill could kill whales, *id.* at 188-89; seals and walrus, *id.* at 172-74; waterfowl, *id.* at 167-69; and fish populations, *id.* at 157-59. In its post-sale evaluation the agency altered this estimate to a 78% chance of one or more oil spills of 1,000 barrels or more during the development and production stage, but predicted none during exploration. (Fed. Pet. App. 81a). Any of these spills could be devastating for rural Alaskan villages. For example, a large oil spill could destroy the walrus haul out areas near St. Lawrence Island, a true disaster for the people of St. Lawrence Island who depend on subsistence re-

facts which led the court of appeals to conclude that the "by-products of oil and gas exploration such as potential oil spills, leakage, and noise" threatened to disrupt subsistence hunting and fishing to the extent that it could "destroy irreparably the isolated and unique culture of the Native Alaskans." *Gambell II*, 774 F.2d at 1426.

Finally, the public interest weighed heavily in favor of the injunction. Since Congress possesses the ultimate authority to order the nation's priorities, the best expression of the public interest is validly enacted legislation. Here that legislation requires the Secretary to follow the specific procedures set out by Section 810(a). If proper deference is accorded Congressional authority, the public interest must be found to favor injunctive relief. As stated by the court of appeals:

> The district court's finding that the public interest favored oil exploration over the preservation of the subsistence culture of the Alaskan Natives violates the clearly expressed Congressional intent that lease sales *shall not* be conducted until the Secretary has evaluated the effect of the Oil Companies' activities on the subsistence uses and needs of Native Alaskans.

*Gambell II*, 774 F.2d at 1426 (emphasis in original). (Fed. Pet. App. 21a).

**B. A Continuing Violation Of Section 810 Of The Conservation Act Warrants Injunctive Relief In The Absence Of Unusual Circumstances.**

The court of appeals would likewise have been justified in issuing the injunction solely on the ground that the only available remedies for a violation of Section 810 are an order voiding the sale or an order enjoining exploration until compliance is achieved.

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sources for over 80% of their food. LITTLE AND ROBBINS, *supra* n. 5, at 294, 334, 343-44. *See also* JA 66-68; 73-80.

While the Constitution vests the power to interpret federal law in the judiciary, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and while the courts will not lightly imply a congressional intent to limit their power, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), Congress can limit the exercise of the courts' discretion. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). Whether a given statute divests the courts of equitable discretion depends upon its language and purposes. The governing principle, as laid down by this Court, is that "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978). If the language and purpose of a given statute can only be effectuated by injunctive relief, the courts have no authority to withhold this remedy. In this instance, no "balancing of equities or . . . the invocation of the generalities of judicial maxims" is permitted. *United States v. San Francisco*, 310 U.S. 16, 30 (1940). When a statute's language and purposes foreclose alternative relief, to balance the equities would substitute the judgment of the judicial branch for that of the legislative.

Determining whether a statute permits remedies other than injunctive relief involves a particularized inquiry into its language and purposes. This Court's decisions in *TVA v. Hill* and *Weinberger v. Romero-Barcelo* illustrate the nature of that inquiry. *TVA v. Hill* involved a request for an order enjoining the completion of a dam which threatened the critical habitat of an endangered species in violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* The statute contained a flat ban on the destruction of critical habitats of endangered species. Since an injunction was the only available remedy for ensuring that the ban was respected, this Court felt bound to issue an order enjoining completion of the project. It stated:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

437 U.S. at 194-95.

By contrast, this Court in *Weinberger v. Romero-Barcelo* rejected the claim that a court was required to enjoin the Secretary of Defense from operating a training facility in violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* Its decision rested on its conclusion that the statute permitted a number of remedies other than the issuance of an immediate prohibitory injunction. Of crucial importance to this determination was that the timing of compliance was not a critical factor: the Act recognized the impracticability of achieving immediate compliance; its provisions only required an immediate cessation when pollution presented a health hazard; and the usual remedy for a violation of its strictures was an order establishing a detailed compliance effort aimed at achieving future compliance. 456 U.S. at 316-20. This Court noted that "the [fact that the] scheme as a whole contemplates the exercise of discretion and balancing of equities [on the part of the executive agency charged with enforcing the statute], militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." 456 U.S. at 316. Since the Act did not require immediate compliance, this Court found that it contemplated relief other than an immediate prohibitory injunction.

Because Section 810 flatly prohibits leasing from proceeding in violation of its mandates, the only potential remedies for its continuing violation are an order voiding

the sales or an order maintaining the *status quo* until compliance is achieved. Section 810 governs the use and disposition of government lands—a power which the Constitution provides is the exclusive concern of Congress.[35] Its legislative history reveals that it is a remedial statute enacted for the sole purpose of remedying Interior's failure to adequately protect the subsistence uses of Alaska Natives. *E.g.*, 126 Cong. Rec. 29,278 (November 12, 1980) (statement of Rep. Udall). That history also indicates that Section 810 implements these policies by restraining the exercise of executive discretion so that the subsistence uses and needs of Alaska Natives are "incorporated into existing land use planning processes." S. Rep. No. 413, 96th Cong., 2d Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5178.

To ensure that subsistence uses are in fact "incorporated into . . . planning processes," Congress conditioned Interior's power to lease public lands. The statute prohibits dispositions of the public lands in Alaska unless the concerned agency studies subsistence uses, evaluates how those uses will be affected by proposed dispositions, holds certain hearings, and makes three specified findings. As a substantive matter, it prohibits any unnecessary development which would unreasonably interfere with subsistence uses.[36] The timing of compliance is crucial. Expressing a congressional determination that compliance must precede leasing, the plain language of Section 810(a) directs the Secretary to comply with the first sentence "[i]n determining whether . . . to lease" and mandates that "no such . . . lease . . . shall be effected" until he complies with

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[35] U.S. Const. art. IV, § 3; *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840).

[36] The substantive protections of Section 810 are supplied by the findings. They are substantive to the extent they require the existence of certain conditions and are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 706.

the second. 16 U.S.C. § 3120(a). Confirming this plain language, the legislative history of Title VIII reveals that Congress intended that "until the requirements of . . . section [810] have been satisfied the proposed action *may not* proceed." S. Rep. No. 413, 96th Cong., 2d Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5178 (emphasis added).

This congressional ordering of the disposition of public lands in Alaska can only be effectuated by an order voiding the action taken or an order maintaining the *status quo* until compliance is achieved. Congress has decided that leasing is a critical stage in the planning process and that compliance must precede leasing. Only two remedies can effectuate and implement this congressional directive. If the Secretary can approach a post-sale compliance effort with an open mind, and the tribal villages submit that he cannot, the proper remedy is an order maintaining the *status quo* until he complies. If he cannot, the proper remedy is an order voiding the sales. The plain language and purpose of the statute simply countenance no other alternative.

## V. THE COURT OF APPEALS CORRECTLY FOUND THAT THIS CASE DID NOT INVOLVE A RETROACTIVE APPLICATION OF THE CONSERVATION ACT.

The Secretary as well as the oil companies also claim that the Conservation Act should not be applied to the Norton Sound and Navarin Basin lease sales even if the Act generally applies to OCS leasing. They rely on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to rebut the "presumption in favor of retroactive" application which, in this Court's words, "can seldom be overcome." *Los Angeles v. Manhart*, 435 U.S. 702, 719, 729 (1978). The decision in *Chevron Oil* sets out the criteria which must be met to rebut the presumption favoring retroactive application. The test requires that a party show: (1) a justifiable reliance

on a well-established interpretation or rule of law; (2) an overall benefit flowing from prospective application; and (3) a balance of equitable considerations tipping in favor of a prospective application. 404 U.S. at 106-107. Designed to ensure that behavior based on reasonable expectations is not unconscionably penalized, the rule identifies those situations when the development of new legal principles should not be applied to past action.

*Chevron Oil Co.* is irrelevant to the Secretary's and the oil companies' claim that the Conservation Act should not apply to OCS lease sales 57 and 83. The record in this case demonstrates that the Conservation Act has not been applied retroactively. Retroactive application by definition involves the application of new law to past actions. In this case, the legal challenges were made *before* the parties acted. Since the legal challenges preceded the actions complained of, the factual predicate for claiming that the Conservation Act is being applied retroactively does not exist. *See Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 709 (7th Cir. 1982), *cert. denied*, 464 U.S. 1017 (1983).

The operative and uncontroverted facts are set out by the lower court's opinion. Congress passed the Conservation Act in December of 1980. *Gambell I* was filed on March 4, 1983, about two weeks before Interior held the Norton Sound sale. It was submitted to the court of appeals following oral argument on October 7, 1983. While the case was submitted, the Secretary determined to hold another lease sale. He did so "with knowledge that his right to do so without complying with the Conservation Act was in doub *Gambell II*, 774 F.2d at 1427. The oil companies that were parties to *Gambell I* bid on the leases offered at this sale. They placed their bids "with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending." *Id.*

These facts do not support the claim that the lower court applied a novel interpretation of the Conservation Act to lease sales held before the Secretary and the oil companies had notice that their interpretation of the Conservation Act would be challenged. This case involves only two lease sales. One was subjected to a Conservation Act challenge before it was held. The other was held after *Gambell I* was submitted—when both the Secretary and the oil companies had actual notice of the potential problems associated with holding an OCS lease sale in Alaska without complying with that Act. Since the two sales at issue were held after all parties had notice of the Conservation Act challenge, this case does not involve the issue of whether the Conservation Act should be applied retroactively. Rather than embodying a retroactive application of a new and unexpected statutory interpretation, the court of appeals' decision merely illustrates the established rule that a litigated case acts as a *lis pendens*, placing on notice all bidders at sales held subsequent to its filing. *E.g., Conservation Law Foundation v. Andrus*, 623 F.2d 712, 720 (1st Cir. 1979); *North Slope Borough v. Andrus*, 486 F. Supp. 326, 331 (D. D.C. 1979).

## CONCLUSION

The court of appeals should be affirmed. Alternatively, the Court should grant the tribal villages' cross-petition and issue a writ of certiorari directing the lower court to consider the aboriginal title claims of Alaska Natives to those portions of the OCS which they have traditionally used and occupied.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

## ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

1. Section 102 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3102, provides in relevant part:

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Section 801 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3111, provides:

The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal

knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

Section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120, provides in relevant part:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide

the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

## ALASKA NATIVE CLAIMS SETTLEMENT ACT

Section 4 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603, provides in relevant part:

(a) All prior conveyance of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

# APPENDIX B

## BRIEF OF APPELLEES JAMES G. WATT, *et al.* IN *GAMBELL I*, pp. 47-49

## III

## EVEN IF THE VILLAGES PREVAIL BEFORE THIS COURT, THE LEASES SHOULD NOT BE VOIDED

The villages assert (Br. 40-41) that they are entitled to have the leases set aside if they prevail on either of their theories. While the Court's power to set aside leases is unquestioned, doing so here would be inappropriate even if the villages' appeal has merit.

* * * *

With respect to the ANILCA claims, we have shown that, even if that statute applies, the Secretary has already taken the steps is requires, though under the authority of other states (see *supra* at 43-47). It is therefore unnecessary to void the agency action in question. See *Denton v. Secretary of the Air Force*, 483 F.2d 21, 28 (9th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). Should the Court find it appropriate to order the Secretary to carry out the procedures of Section 810, there is no need to undo what has already been done. The proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply. See *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3818 (May 16, 1983).

Thus, the highly disruptive remedy of voiding the leases should not be afforded even if the villages prevail.

# APPENDIX C

## BRIEF OF APPELLEES ARCO ALASKA, INC., *et al.* IN *GAMBELL I*, pp. 47-50

### III. The Remedy Demanded By Plaintiffs Is Inappropriate.

Plaintiffs assert that, if this Court finds either of their theories meritorious, then the Court must at once void the leases. Plaintiffs will not be satisfied if the Court, assuming irreparable harm can be shown, enjoins exploration and development activity pending resolution of plaintiffs' aboriginal title claim at trial or pending the Secretary's explicit compliance with § 810 of ANILCA. Plaintiffs' goal is to obtain the relief that will have maximum disruptive effect on the lease sale.

A similar issue was presented to this Court, and decided adversely to plaintiffs, in *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3818 (U.S. May 16, 1983). That case involved the question whether the Secretary was required, before selling leases, to make a determination that the lease sales were consistent with the adjacent state's coastal management plan. The Court held that he was so required. This Court affirmed the district court's order insofar as it enjoined development activities until such time as the Secretary made the required consistency determination. The district court had also voided the bids for the tracts at issue and ordered the deposits returned to the bidders. This Court vacated that portion of the district court's order, agreeing with the defendants that

> "cancellation of bids after their contents have been revealed is excessive, punitive, unprecedented, and destroys the essence of secret bidding procedures, thus causing the loss of millions of dollars the bidders spent compiling the data for the bids. . . . [S]uch drastic measures should

> be deferred at least until it is finally decided whether Lease Sale 53 can go forward in its present form."

683 F.2d at 1266. For the same reasons, if plaintiffs should prevail on this appeal, this Court should not void the leases, but should do no more than, at most, enjoining environmentally sensitive operations pending the conclusion of subsequent proceedings.

* * * *

**B. The ANILCA Claim**

Plaintiffs' ANILCA claim is, for purposes of determining the appropriate provisional remedy, equivalent to the Coastal Zone Management Act claim in *California v. Watt:* plaintiffs argue that the Secretary did not undertake certain procedures required by statute to be completed before the lease sale went forward. If this Court should hold that § 810 of ANILCA applies to the OCS, the appropriate remedy would be the same as that ordered in *California v. Watt:* to enjoin further activities until the Secretary completes the procedures required by the statute if irreparable harm is shown, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). Plaintiffs' assertion that the Secretary will perform the procedures in bad faith, Appellants' Brief at 42, has no merit. The Court must assume that an administrative agency will comply with the law. *See SEC v. Chenery Corp.*, 332 U.S. 194, 199-200 (1947) (on remand, SEC is free to arrive at the same decision if it applies the proper criteria).

Supreme Court, U.S.
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No. 85-1239

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States of Appeals for the Ninth Circuit**

## REPLY BRIEF OF AMOCO PRODUCTION COMPANY, *et al.*

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*Respondents.*

---

## REPLY BRIEF OF AMOCO PRODUCTION COMPANY, *et al.*

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## I. SECTION 810(a) OF ANILCA DOES NOT APPLY TO THE OCS.[1]

### A. The Subsistence Protection of Section 810(a) of ANILCA Is Narrower than the Title Extinction Effected by Section 4(b) of ANCSA.

The essence of respondents' argument that ANILCA applies to the OCS is summed up at page 21 of their brief:

> "Alaska Natives agreed to have Congress extinguish their aboriginal claims based on the un-

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[1] Petitioners will not respond to Question 1 of respondents' brief regarding their claims of aboriginal title or to any portion of the *amici* brief of North Slope Borough, *et al.*, which is devoted entirely to that question, since this Court did not grant respondents' cross-petition which raised this question, after petitioners demonstrated that it was not properly presented in this case and that it was without merit.

> derstanding that their subsistence uses on affected lands would be protected. If the Claims Settlement Act applies to the OCS, so does Title VIII."[2]

However, Title VIII of ANILCA protects subsistence only on "public lands." By contrast, the lands "affected" by ANCSA include not only federally owned "public lands," but also State and private lands. *See* 43 U.S.C. §§ 1603(b) & (c). Thus, the scope of ANILCA's subsistence protection is much narrower than ANCSA's title extinction.

This difference in the scope of the two statutes was consistently recognized in the legislative history of both statutes. Respondents point to various subsistence proposals that were rejected during the consideration of ANCSA, but argue that the ANCSA Conference Committee intended to insure, by oversight or other means, that Native subsistence rights would be protected in the future. (Resp. Br. 26 & n.26, 27). However, the subsistence measures that were then considered by Congress did not extend to the OCS.

For example, S. 35, 92d Cong., 1st Sess., § 21(a) (1971), would have directed the Secretary of the Interior "to classify . . . public lands surrounding any or all of the Native Villages and groups for which lands are withdrawn under Section 13 through 15 and under Section 23 as Subsistence Use Units." Such "withdrawn" "public lands" would have been onshore lands. *See, e.g.*, S. 35, § 13(b)(1) withdrawing "all public lands in each township, which encloses all or part of any Native Village . . . plus all public lands in each

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[2] Of course, Congress did not need the Natives' agreement to extinguish their aboriginal title claims. As respondents concede, "aboriginal title . . . [can] be extinguished at will by the sovereign holding the fee." (Resp. Br. 14). Moreover, as they have also conceded, ANCSA provided them with "generous" consideration for their extinguished titles and claims—more than 40 million acres of lands and nearly $1 billion in cash. (Resp. Opp. to Cert. Petns., p. 7).

township which is contiguous to or corners upon the townships in which such Native Villages are located. . . ."

The ANCSA Conference Committee's expectation that the Secretary would use his "existing withdrawal authority" to protect subsistence (Resp. Br. 26) must be read against such proposed ANCSA subsistence measures. Since Congress had considered directing the Secretary in ANCSA to withdraw onshore lands surrounding Native villages to protect subsistence, it was such "withdrawal authority" that the ANCSA Conference Committee obviously had in mind, not limitations on OCS leasing.

Respondents argue that "[w]hen Interior failed to heed this admonition [of the ANCSA Conference Committee], Congress was forced" to protect subsistence by enacting ANILCA. (Resp. Br. 6). But the subsistence protection which Congressman Udall then thought was necessary pertained only to subsistence uses on the so-called "D-2 lands" onshore Alaska. (*See* Amoco Br. 25-26). Secretary of the Interior Andrus also believed that ANCSA's implicit promise to the Natives regarding subsistence protection could be similarly satisfied. (*Id.* at 26). The views of a member of Congress in the "thick of the fray" regarding ANCSA[3] and of the official principally charged with implementing that statute[4] constitute very persuasive evidence that ANCSA's extinguishment of title did not entail a *quid pro quo* dictating subsistence protection on the OCS.

Moreover, the proposed modification of the Udall/Andrus position advocated by the Alaska Federation of Natives (AFN) and eventually accepted by the Congress was not designed to make ANILCA's subsistence protection coextensive with ANCSA's title extinguishment. Although respondents baldly assert that the AFN took the position that Congress should "apply the subsistence title [of AN-

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[3] *Heckler* v. *Turner*, 470 U.S. 184, 209 (1985).

[4] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

ILCA] to all lands to which [ANCSA] had extinguished title" (Resp. Br. 28), they are forced to admit that the AFN's proposal was limited to extending subsistence protection "to all Native subsistence uses on all Federal public lands" (*id.*). Neither the AFN nor anyone else ever made the linkage which plaintiffs now discern between the scope of ANCSA's extinction of title and the extension of ANILCA's subsistence protection.[5]

### B. The OCS Is Not "Situated in Alaska" Within the Meaning of ANILCA.

Respondents do not argue that the OCS is "situated in Alaska" within the meaning of the Alaska Statehood Act, the OCS Lands Act, or the Submerged Lands Act. (*See* Amoco Br. 13-14). Instead, respondents stand entirely upon the Ninth Circuit's interpretation of "in Alaska" in Section 4(b) of ANCSA as extending to the OCS. They contend that, given this interpretation of ANCSA, the OCS must similarly be "situated in Alaska" for purposes of ANILCA. In addition to failing to come to grips with petitioners' showing (Amoco Br. 14-15) that the Ninth Circuit need not have relied on Section 4(b) of ANCSA to reject respondents' claims of aboriginal title and with our showing in Part I.A. above that there is no basis for construing Section 4(b) of ANCSA and Section 810 of ANILCA *in*

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[5] Respondents argue that the AFN's restriction of subsistence protection to public lands located within the exterior boundaries of the 12 regional corporations could have contemplated the extension of Section 810 of ANILCA to the OCS since, according to respondents, the boundaries of the regional corporations were understood to include the OCS. (Resp. Br. 29 n.28). The document which they cite for this proposition (Pl. Ex. I) is a crudely drawn map which projects some corporate boundary lines to include offshore islands. ANCSA, 43 U.S.C. § 1606(a), clearly contemplates that the boundaries of the 12 regional corporations established by the statute would all lie within the State of Alaska: "[T]he State of Alaska shall be divided . . . into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests."

*pari materia*, there is another fatal flaw in respondents' argument.

In Section 4(b) of ANCSA the term "in Alaska" was defined as "including submerged land underneath all water areas, both inland and offshore." The term "include" or "including" is sometimes used in a statutory context "to add to the general class a species which does not naturally belong to it." *Morris Friedman & Co.* v. *United States*, 351 F. Supp. 611, 613 (Cust. Ct. 1972). *See also* Black's Law Dictionary 687 (5th ed. 1979). In this sense, the term "including" is a short-hand expression for the phrase "for the purposes of this statute the term [x] shall include [y]."[6] Congress' addition of the phrase "including submerged land . . . offshore" in Section 4(b), therefore, does not imply that the phrase "in Alaska," when not specifically modified to apply to the OCS, comprehends that region. Thus, when Congress in ANILCA used only the phrase "situated in Alaska," it gave no indication that the phrase should extend to the OCS.

Respondents' argument is not advanced by their reference to a reply memorandum filed in the *Inupiat Community* case (Resp. Br. 32-33), where some of the petitioners argued that it was "perfectly natural" for Congress to include the OCS within the phrase "in Alaska" in Section 4(b) of ANCSA. The same memorandum noted that Congress made clear in ANCSA that it intended to

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[6] That Congress used the term "including" in Section 4(b) to broaden its scope is strongly suggested by the last clause of that provision. It "includ[es] any aboriginal hunting or fishing rights that may exist" among the "aboriginal titles . . . and claims of aboriginal title" extinguished by Section 4(b). Hunting and fishing rights are broader than "aboriginal titles." *See* F. Cohen, *Handbook of Federal Indian Law* 442 (1982 ed.) ("[t]he existence of aboriginal hunting and fishing rights . . . does not necessarily turn upon the existence of original title to lands"); *id.* at 450-51 (discussing off-reservation hunting and fishing rights). Thus, when Congress "includ[ed]" such rights in the scope of Section 4(b), it was extending the scope of the statute.

effect a "fair and just settlement of *all claims by Natives and Native groups of Alaska*, based on aboriginal land claims." (Reply Memo. p. 104, quoting 43 U.S.C. § 1601(a)). Where Congress made clear its intention to do away with all such claims, it would be "perfectly natural" to include the OCS within the phrase "in Alaska," particularly when Congress went on explicitly to "includ[e] submerged land . . . offshore" within the scope of Section 4(b). It was not "perfectly natural" for the Ninth Circuit to construe Section 810(a) of ANILCA—which pertains only to "public lands" and is silent as to the OCS—as extending to that region.[7]

**C. The United States Does Not Assert Title to the OCS.**

Neither respondents nor their supporting *amici* come to grips with petitioners' several arguments that the United States has not asserted "title" to the OCS. Instead, they advance three patently erroneous arguments in support of their position.

First, respondents and *amici* State of Alaska make the irrelevant point that the term "lands" as used in ANILCA is broadly defined to include "lands, waters, *and interests therein*." (Resp. Br. 23). However, Section 810(a) applies only to those "lands" as to which the United States asserts "title." 16 U.S.C. § 3102(2). The United States has never asserted title to any "lands, waters, [or] interests" on the OCS (Amoco Br. 15-19). Instead, as to "interests" such

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[7] The State of Alaska cites *United States* v. *Ptasynski*, 462 U.S. 74, 77-78 (1983), for the proposition that "exempt Alaskan oil" under the windfall profit tax, 26 U.S.C. § 4991(b)(3), includes oil produced on the Alaskan OCS. However, the statute defines "exempt Alaskan oil" generally as oil produced north of the Arctic Circle, and the Court held that the statutory description of the oil as "Alaskan" is "not entirely accurate," in part because "oil produced in certain offshore . . . waters . . . beyond the limits of any State—is included within the exemption." *See generally* 26 U.S.C. § 4994(e). This suggests that if the statute had defined "exempt Alaskan oil" as oil produced "in Alaska" the Court would have held that it did not apply to the OCS.

as fishing or mineral rights it has, in the words of the recent House report (*id.* at 16), asserted only "resources-related claims of jurisdiction. . . ." H.R. Rep. No. 300, 99th Cong., 1st Sess. 591-92 (1985).

Second, Alaska errs in arguing that the United States must assert title to OCS oil and gas, since it conveys leasehold rights that allow exploitation of these minerals. (Alaska Br. 11-12). However, the grant of a lease to allow a person to explore for oil and gas does not imply that the lessor has "title" to the oil and gas itself. *See Ohio Oil Co.* v. *Indiana*, 177 U.S. 190 (1900).[8] Moreover, the exclusive rights enjoyed by the United States to exploit the resources of the OCS do not imply that it has title to them. *See United States* v. *Ray*, 423 F.2d 16 (5th Cir. 1970).[9]

Third, respondents argue that Section 1001 of ANILCA specifically exempts the OCS from the scope of the study contemplated by that section and that OCS lands are specifically excluded from two other federal statutes which generally apply to federally owned lands. (Resp. Br. 24-25). Petitioners have previously addressed the Section 1001 argument. (Amoco Br. 13; Hodel Br. 32 n.20). As is there

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[8] In *Ohio Oil*, this Court, interpreting State law, held that the owner of a surface estate has no "title" to the oil or gas underlying the surface "until the substances are actually reduced by him to possession." A number of important oil-producing States continue to follow this theory, 1 H. Williams & C. Meyers, *Oil and Gas Law* § 203.1, at 33 (1985), while others embrace only a "qualified" ownership theory regarding title to unproduced oil and gas, *id.* § 203.2 at 39-44. Only a minority of oil-producing States recognize "title" to unproduced oil and gas. *Id.* § 203.3 at 44-50.

[9] In *Ray*, the United States carefully avoided an assertion of title to a submerged reef on the OCS, 423 F.2d at 19 n.3, 21-22, while simultaneously seeking an injunction against its use by an unauthorized party. The court granted the injunction, holding that "neither ownership nor possession is . . . a necessary requisite for the granting of injunctive relief." 423 F.2d at 22.

revealed, Congress's exclusion of the OCS from the Section 1001 study seems to have been prompted by an abundance of caution. The same observation can be made about the other two statutes relied upon by respondents. Congress' caution in this regard should not be converted into a *sub silentio* assertion of title to the OCS for purposes of Section 810 of ANILCA.

From the time of the Truman Proclamation to the present, Congress has often directly confronted the OCS title issue and has never asserted United States title to any lands, waters, or interests in land on the OCS. Nothing in ANILCA suggests that Congress silently abandoned this posture and asserted title to the OCS so as to apply ANILCA's subsistence protection there. To the contrary, Congress' use of the term "public lands" to define the scope of ANILCA and its prior use of that same term in both the Statehood Act and ANCSA—ANILCA's direct predecessors—in contexts which could not possibly apply to the OCS (Amoco Br. 22-24), clearly demonstrate that Congress did not intend in ANILCA to assert title to the OCS.[10]

**D. ANILCA Is Not a General Subsistence-Protection Statute.**

Contrary to Alaska's argument (Alaska Br. 17-19), Section 810 is not a general subsistence-protection statute. It applies only when the United States disposes or permits the use of lands to which it holds title that are situated in Alaska. Therefore, the Act does not apply to actions of the federal government that might take place on lands or waters within three miles of the Alaska coast, since these lands are owned by the State pursuant to the Submerged Lands Act. Similarly, it does not apply to such actions on Native-owned lands, where presumably the bulk

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[10] It is noteworthy that at no point in their briefs do respondents or Alaska assert that the OCS is part of the "public lands" under the Statehood Act or ANCSA.

of subsistence activities occur, or on State or privately owned onshore lands that are used for subsistence. Thus, the issue here is not, as Alaska argues (*id.* at 18), whether Congress intended to "abandon its concern for subsistence at the three mile line," since ANILCA does not apply to the territorial sea nor to adjacent onshore lands where most subsistence occurs.

There are, of course, other federal statutes that do protect subsistence within State waters, on Native, State or private lands, and on the OCS from impacts of federal activities. Under the National Environmental Policy Act, 42 U.S.C. § 4321 (NEPA), federal agencies must analyze their actions to assess subsistence impacts. Indeed, in this case the district court concluded that analysis done under NEPA evaluated the effects of leasing on subsistence and alternatives that would reduce or eliminate the impacts of OCS leasing. (Amoco Br. 7). Moreover, the Endangered Species Act, 16 U.S.C. § 1531 (ESA), protects important subsistence species, such as the bowhead and gray whale, as does the Marine Mammal Protection Act, 16 U.S.C. §1361. It is these statutes, all of which were complied with by the Department of the Interior in this case, not ANILCA, that afford broad-based protection of subsistence.

## II. THE RESTRICTIONS OF SECTION 810(a)(1)-(3) DO NOT APPLY TO OCS LEASE SALES THAT ARE UNLIKELY TO RESTRICT SUBSISTENCE.

Respondents attempt to avoid petitioners' showing that the lower court misapplied Section 810(a)(1)-(3) in requiring full leasing-stage compliance with the statute by arguing that "[t]he court of appeals . . . ignored the post-sale evaluations." (Resp. Br. 35). However, *Village of Gambell* v. *Clark*, 746 F.2d 572, 582 (9th Cir. 1984) (Amoco Petn. A21) (*Gambell I*), itself recognized that the preparation of a post-sale ANILCA evaluation might sustain a sale when it remanded to the district court the question whether "the proper remedy is to maintain the status quo unless and

until the Secretary complies with section 810. . . ."[11] Moreover, in *Village of Gambell* v. *Hodel*, 774 F.2d 1414, 1421-22 (9th Cir. 1985) (Amoco Petn. A34) (*Gambell II*), the court noted with apparent approval the Secretary's preparation of a post-sale ANILCA evaluation for Sale No. 57 and relied on its conclusion that the development and production stage of the sale "may significantly restrict subsistence uses in certain areas" in holding that the Secretary must comply with the requirements of Section 810(a)(1)-(3) prior to proceeding with further activities in the Sale No. 57 area. Respondents cannot, therefore, defend the decision below on the ground that it properly "ignored the post-sale evaluations."[12]

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[11] This is precisely the course of action which the Ninth Circuit followed in *California* v. *Watt*, 683 F.2d 1253, 1256 (9th Cir. 1982), *rev'd on other grounds*, 464 U.S. 312 (1984), when it permitted Interior to prepare a post-sale consistency determination under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451.

[12] The decisions of this Court cited by petitioners in support of their argument that the courts cannot consider *post hoc* analyses of administrative actions are distinguishable. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), and *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), involved the quite different issue of the use of arguments made by counsel to provide a *post hoc* explanation of agency action. *Camp* v. *Pitts*, 411 U.S. 138 (1973), and *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), held that an agency's action must be reviewed on the basis of the administrative record; neither held that the courts can consider only administrative documents prepared prior to the challenged decision. To the contrary, *Overton Park* specifically suggested that the Secretary of Transportation could prepare *post hoc* formal findings to provide an explanation of his action. 401 U.S. at 420.

A court exercising judicial review of administrative action "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939). Thus, a court which discovers a flaw in an agency's action is not required immediately to set it aside, if such relief would have adverse consequences upon the government or third parties. Instead, the court can identify the agency's error and remand the

### A. Section 810's Specific Reference to "Leases" Does Not Sustain the Decision Below.

Respondents' and the State of Alaska's emphasis that Section 810(a) of ANILCA specifically refers to the term "lease" does not rebut our argument. The term "lease," like all of the other dispositions of land referred to in Section 810(a), appears in both of the "tiers" of the section. The first "tier" of Section 810(a) requires Interior to evaluate the impacts of the proposed disposition, the availability of other lands, and other alternatives, whenever the Department proposes to "lease" or otherwise dispose of land subject to Section 810(a). Petitioners have never denied that the leasing of all lands subject to the section must be evaluated pursuant to these first-tier requirements.

The second-tier requirements of Section 810(a)—(1) notice, (2) hearings, and (3) specified findings—are applicable to "leases" or other dispositions only if they "would significantly restrict subsistence uses." Clearly Congress did not intend that every "lease" or other disposition referred to in the second tier of Section 810(a) would be subject to those requirements. Thus, the issue here is not whether leasing is subject to Section 810(a)—clearly it is subject to the first-tier requirements—but instead is whether the specific leasing proposed by Interior in this case has the type of effect on subsistence which requires compliance with the second-tier requirements.[13]

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proceedings to allow the agency to cure its error through further proceedings. *See, e.g., Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980); *Rodway* v. *United States Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975).

[13] Contrary to respondents' assertions (Resp. Br. 37), petitioners do not take the position that the issuance of a lease can never trigger the second-tier requirements of Section 810(a)(1)-(3). Certainly, those requirements would attach where a federal agency leases land and relinquishes control over the use of the property, if that action gives

**B. Section 810(a)(1)-(3) of ANILCA Should Not Be Interpreted *in Pari Materia* with NEPA.**

Respondents argue that, because NEPA requires the preparation of an impact statement when substantial questions are raised concerning a project's impacts on the environment, there should be full-fledged compliance with Section 810(a)(1)-(3) of ANILCA whenever questions are raised concerning possible impacts upon subsistence. This argument ignores fundamental differences between Section 810(a)(1)-(3) and NEPA.

As noted, petitioners do not dispute that all leasing of those lands subject to ANILCA must be evaluated pursuant to the requirements of the first-tier of Section 810(a). Like NEPA, that evaluation entails review of the impacts of the proposed action and consideration of relevant alternatives. However, the second tier of Section 810(a)—particularly the determinations required by Section 810(a)(3) that the project will use the minimal amount of lands necessary and will not proceed until adequate mitigation measures are adopted—goes beyond what Alaska properly recognizes are the "essentially procedural [requirements of NEPA]." (Alaska Br. 23). Thus, Congress designed the first tier of Section 810(a), like NEPA, to apply to all proposed dispositions of public lands, but limited the scope of the second-tier requirements of the section to only those dispositions that "would significantly restrict subsistence."[14]

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rise to a likelihood that subsequent private action on the leased property would significantly restrict subsistence. It is even possible that those requirements would arise in a multi-stage leasing setting, if it is established that leasing is likely to be followed by significant subsistence restrictions at later stages. In this case, however, the Interior Department properly found that neither leasing nor exploration would significantly restrict subsistence and that there is only a 13-14% probability of reaching the production stage where such restrictions may occur.

[14] Alaska argues (Alaska Br. 28) that "[w]here the objective of the

### C. The Purposes of Section 810(a) Do Not Require Leasing-Stage Compliance with Its Second-Tier Requirements when the Secretary Retains Authority To Regulate All Subsequent Stages.

Respondents concede that "the Secretary retains broad control over exploration, development, and production activities under the OCSLA." (Resp. Br. 39). They nonetheless contend that "leasing constitutes an irrevocable commitment of resources" and a "critical" stage because money then changes hands, tracts are leased, and stipulations are adopted bearing upon later operations. (*Id.*). Accordingly, respondents argue that the purposes of Section 810(a) can be satisfied only if Interior is forced to comply, in full, with all of the requirements of that section prior to authorizing the leasing stage of an OCS project.

This Court considered such arguments in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). There, too, it was argued as the premise for CZMA compliance at the leasing stage

> "that a lease sale is a crucial step. Large sums of money change hands, and the sale may therefore generate momentum that makes eventual exploration, development, and production inevitable." 464 U.S. at 342.

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statute is to provide good information . . . courts have required that the project be examined in its entirety rather than piecemeal," and cites seven court of appeals opinions, three of which pertain in part to analysis of projects under the ESA. The ESA, like the second-tier requirements of ANILCA, imposes substantive restrictions upon leasing. The three ESA decisions cited by Alaska—*North Slope Borough* v. *Andrus*, 642 F.2d 589, 607-10 (D.C. Cir. 1980); *Conservation Law Found.* v. *Andrus*, 623 F.2d 712, 715 (1st Cir. 1979); and *Village of False Pass* v. *Clark*, 733 F.2d 605, 610-12 (9th Cir. 1984)—all recognized that Interior is not required at the leasing stage of an OCS project to impose ESA-motivated restrictions on leasing, but instead has sufficient regulatory authority to impose such limitations at those later stages which give rise to a threat of jeopardy to an endangered species.

However, this Court noted the other side of that argument—

> "that . . . review at the lease sale stage is at best inefficient and at worst impossible: Leases are sold before it is certain if, where, or how exploration will actually occur." *Id.*

The Court concluded that Congress had decided which side of the argument should prevail by structuring OCS projects to require CZMA review at exploration and production and by limiting CZMA review of federal activities to those which "directly affect[]" the coastal zone. Thus, notwithstanding claims that leasing is a "crucial step," the Court held that it was not subject to the CZMA.

For the same reasons, OCS leasing is not subject to the second tier of ANILCA. Just as the CZMA provides for subsequent review at later stages of an OCS project which might give rise to effects within the purview of the statute, Section 810(a) of ANILCA clearly applies to all later stages of multi-stage projects. Accordingly, it cannot be held that leasing "would significantly restrict subsistence" merely because of the presently remote prospect that subsistence restrictions may occur at a later stage. Assuming *arguendo* that ANILCA applies to OCS sales, its purposes can be fully realized by applying the second-tier requirements of Section 810(a) prior to any stage that "would significantly restrict subsistence."

## III. THE NINTH CIRCUIT'S RULING IN *GAMBELL I* SHOULD NOT BE APPLIED RETROACTIVELY.

Respondents' only answer to petitioners' showing that *Gambell I* should not be applied retroactively under this Court's decisions in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978), and other cases is to point out that a legal challenge to Sale No. 57 was filed prior to the conduct of either that sale or of Sale

No. 83. However, the *Huson* test for determining the retroactive application of a new interpretation of a statute does not turn upon whether a complaint was filed prior to a challenged transaction. While the third prong of that test—whether a retroactive application of a new decision would involve inequities—would seem to allow consideration of the timing of a complaint, neither *Huson* nor any other decision of this Court suggests that the prior filing of a complaint *per se* tips the equities in favor of plaintiffs.[15]

Sale Nos. 57 and 83 were not conducted until after a district court had rejected respondents' theory that ANILCA applies to the OCS and a motions panel of the Ninth Circuit had permitted the consummation of Sale No. 57. In these circumstances, the equities lie with the industry petitioners who were forced either to cast their bids at the two sales or to lose for all time their opportunity to do so.[16]

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[15] Indeed, in *Manhart* the Court refused to disturb any part of the pension plan which was attacked by plaintiffs, including the administration of those monies in the plan accumulated since the filing of the plaintiffs' complaint.

[16] Respondents' reliance upon their Sale No. 57 complaint, whatever its relevance to the equities as to that transaction, does not justify a retroactive application of *Gambell I* to Sale No. 83. That sale proceeded without any litigation challenge, so that respondents' *lis pendis* argument (Resp. Br. 50) does not apply to it. Moreover, the Sale No. 57 complaint applied only to those portions of the OCS that are used by Native Alaskans and thus are subject to their claims of aboriginal title. Respondents have never contended that they use any portion of the remote Navarin Basin affected by Sale No. 83. Moreover, in their brief in this Court they have conceded that Interior may continue to lease "those substantial [OCS] areas not historically used by Alaska's Native peoples." (Resp. Br. 21). Thus, when Sale No. 83 took place, there was no reason to believe that respondents or anyone else would assert that ANILCA applies to the Sale No. 83 area.

## IV. THE NINTH CIRCUIT'S *PER SE* INJUNCTIVE RELIEF RULE IS INCONSISTENT WITH THE COURT'S DECISION IN *WEINBERGER* v. *ROMERO-BARCELO.*

Both of the petitions in this case sought this Court's review of *Gambell II's* articulation of the "Ninth Circuit rule" that a "substantive [*sic*? substantial] procedural violation" of an environmental statute *per se* justifies the grant of an injunction, except in "rare" circumstances where the injunction would harm the environment or interfere with a very limited class of long-term contracts. In briefing this question, petitioners cited this Court's recognition in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982), that Congress can restrict courts' equitable discretion to deny injunctive relief, but pointed out that the Ninth Circuit had not analyzed ANILCA to determine whether it did so. (Amoco Br. 43-44). Instead, petitioners demonstrated that the Ninth Circuit had attempted to distinguish *Weinberger* because it allegedly presented only a narrow question regarding the Clean Water Act. (*Id.* at 44).

Respondents do not even attempt to defend this distinction of *Weinberger*.[17] Instead, they contend that "[w]hether the court of appeals relied on a *per se* rule in this case is subject to question" (Resp. Br. 41), and then go on to argue that either the application of "traditional

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[17] Respondents do argue that petitioners conceded in *Gambell I* that an injunction should issue pending Interior's compliance with ANILCA (Resp. Br. 40-41), thus suggesting that they are now estopped from challenging the Ninth Circuit's *Gambell II* injunction. However, the very documents attached by respondents to their brief show that petitioners qualified their argument in *Gambell I* by citing *Weinberger* and making clear that an injunction would be appropriate only "if irreparable harm is shown." (Resp. Br. 7a; *see also id.* at 6a).

equitable principles" or an analysis of ANILCA justifies the court of appeals' reversal of the district court.[18]

In arguing this latter point, respondents admit that

> "[w]hether a given statute divests the courts of equitable discretion depends upon its language and purposes." (Resp. Br. 45).

They concede that this case requires a "particularized inquiry into [ANILCA's] language and purposes." *Id.* The *amici* supporting respondents go even farther. They admit that "[i]n most instances, Congress does not foreclose . . . discretion" (States Br. 9) and stress that an appropriate assessment of the propriety of the Ninth Circuit's reversal of the district court here requires a close reading of the terms and legislative history of ANILCA. (*Id.* at 13-17; *see also* NRDC Br. 6-8).

It is, therefore, quite apparent that there is no division between the parties as to the injunctive-relief question presented in the petitions in this case. Petitioners demonstrated in their opening briefs that the Ninth Circuit's *per se* rule was hopelessly at odds with *Weinberger*'s teaching that the propriety of injunctive relief depends upon an inquiry into the underlying statute and facts of the case, and respondents no longer contest this point.

This Court, therefore, would be justified in reversing the Ninth Circuit's decision as being improperly based upon its *per se* rule and declaring that the "Ninth Circuit rule" reiterated in *Gambell II* is inconsistent with *Weinberger*.

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[18] Respondents' argument that "traditional equitable principles" sustain the decision below is premised upon their willingness to disregard the massive financial losses that industry petitioners would have suffered by virtue of an injunction because they were made after the court of appeals' decision in *Gambell I*. (Resp. Br. 42). Respondents fail to note that $60 million of these commitments concerned the Sale No. 83 region, and were incurred prior to the filing of any complaint regarding that sale. (Amoco Petn. A51-52, dissenting opinion of Judge Dimmick).

Such an approach would avoid the "particularized inquiry" that would otherwise be necessary to determine whether ANILCA, as applied to the facts of this case, justifies the preliminary injunction mandated by the lower court.[19] Should the Court nonetheless desire to go beyond a declaration of the invalidity of the "Ninth Circuit rule," it should reject respondents' and *amici*'s arguments that a particularized inquiry into the applicable law and facts supports the Ninth Circuit's decision in *Gambell II*.

Respondents and *amici* mistakenly attempt to distinguish *Weinberger* and to rely on *TVA* v. *Hill*, 437 U.S. 153 (1978), on the ground that Section 810(a) of ANILCA—like the ESA in *Hill*—imposes a "nondiscretionary duty" on the Secretary to analyze effects on subsistence. (NRDC Br. 6). However, the duties imposed by Section 810(a) cannot be distinguished from those in *Weinberger*, since the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342(a), also imposes non-discretionary duties; it absolutely prohibits the release of substances into navigable waters in the absence of a permit issued by the Environmental Protection Agency. Nonetheless, after the district court determined that the discharges at issue in *Weinberger* posed no threat of irreparable harm to the waters in question,

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[19] This case is an especially inappropriate one for this Court to engage in the "particularized inquiry" necessary to determine whether an injunction is or is not appropriate. In the first place, there are two different transactions before the Court which raise different issues under Section 810(a) of ANILCA. Sale No. 57 involves the question of plaintiffs' entitlement to injunctive relief because the second-tier requirements of the statute have not been complied with after Interior found that there may be significant subsistence restrictions at the production stage. By contrast, Sale No. 83 involves an alleged violation of the first-tier requirements of ANILCA where the Department found, when complying with NEPA, that no stage of the sale is likely to cause significant subsistence restrictions. The difficulties of applying the statute to these two transactions are magnified by the fact that there are important questions before the Court regarding the interpretation of ANILCA. *See* part II, *supra*.

456 U.S. at 310, this Court ruled that the violation of the Clean Water Act there established did not mandate issuance of an injunction.

Moreover, there is a dispositive distinction that separates both this case and *Weinberger* from *Hill*. In *Hill*, it was conceded that denial of the injunction sought by plaintiffs would immediately lead to the very consequences prohibited by the statute—the destruction of an endangered species and its habitat. 437 U.S. at 173-74. Had this Court refused to uphold the injunction afforded plaintiffs below, it would have, in effect, nullified the ESA as invoked by them; the choice faced by the Court in *Hill* was either to grant the injunction against completion of the dam or refuse to provide plaintiffs with any relief for the statutory violation that they had established.

In both *Weinberger* and this case, by contrast, grant of the precise relief sought by plaintiffs was not necessary to assure that a statutory violation would not go unremedied. Here, the district court merely denied a preliminary injunction against imminent exploration; [20] it has not ruled that respondents will be denied alternative remedies after a hearing on the merits if they establish a violation of ANILCA. Accordingly, the district court's denial of the injunction in this case falls well within the traditional equitable discretion possessed by courts in designing remedies. Unlike *Hill*, the denial of the injunction sought by

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[20] Respondents refer to *dicta* in the court of appeals opinion regarding the alleged threats posed by exploration to Native subsistence. (Resp. Br. 44). However, Interior determined that exploration itself would not lead to significant subsistence restrictions within the meaning of ANILCA, and the district court independently found that "exploration will not significantly restrict subsistence resources." (Amoco Petn. A63). Since the court of appeals did not declare that finding to be either clearly erroneous or an abuse of discretion, its reversal of the district court's denial of the injunction cannot be sustained by its speculation as to the potential impacts of exploration on subsistence. *See* Amoco Br. 41-42 & n.46.

respondents here does not constitute a refusal by the courts to enforce the statute.

## CONCLUSION

For the reasons stated above and in petitioners' opening brief, the decision below should be reversed.

Respectfully submitted,

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Nos. 85-1239 and 85-1406

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE FEDERAL PETITIONERS

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No. 85-1239

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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No. 85-1406

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In their submissions, respondents and amici repeat the arguments that Congress intended Section 810 of ANILCA, 16 U.S.C. 3120 to apply throughout the OCS *and* that Congress specifically required the judicial issuance of broad injunctive relief in virtually all cases in which Section 810 is violated, thereby relieving a person seeking to enjoin an ongoing federal program from making the traditional showing required to obtain such extraordinary relief. As we explained in our opening brief and further show in this submission, neither proposition is tenable. Respondents also reiterate their claim that the Secretary violated Section 810

by failing to implement procedural requirements at the lease sale stage that, in their view, were triggered because of a mere possibility of significant subsistence restrictions at the development and production stage. Under respondents' view, however, all Section 810 review of the OCS planning process would have to occur at the initial lease sale stage, in contravention of the rationale of this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). Finally, respondents replace the court of appeals' misapplication of the rules governing retroactive application with their own erroneous argument that retroactivity is not at issue in this case at all. We respond to each of respondents' contentions below.

1. In our opening brief (Br. 17-27), we explained that the court of appeals reversed the district court's denial of preliminary injunctive relief on the erroneous ground that a court has a "duty" to enter an injunction when it finds a violation, or likely violation, of a procedural environmental statute, except in "unusual circumstances" (see Pet. App. 15a). We established, moreover, that the district court properly applied traditional principles of equity in denying respondents' request for injunctive relief (see Br. 18, 27). Respondents' response is two-fold: first, in an understandable effort to distance themselves from the court of appeals' rationale, respondents primarily contend (Br. 42-44) that traditional equitable principles support a grant of preliminary injunctive relief; and, second, respondents alternatively attempt to support the court of appeals' ruling by contending (*id.* at 44-48) that Section 810 of ANILCA evinces congressional intent to compel the issuance of injunctive relief in this case. Both contentions are unavailing (even on the assumption, which we also contest, that Section 810 applies to this case).

a. First, respondents' argument that the court of appeals could have granted preliminary injunctive relief on the basis of traditional equitable principles is misdirected because it misapprehends the procedural posture of the case. The district court applied traditional equitable

principles and, on that basis, properly *denied* respondents' request for preliminary injunctive relief. The district court concluded that "[t]he balance of irreparable harm does *not* favor the [respondent]" and that "[t]he public interest favors continued oil exploration" (Pet. App. 43a (emphasis in original)). Hence, the only issue before the court of appeals was whether the district court's decision amounted to an abuse of discretion. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975). Neither the court of appeals nor respondents, however, have shown that such an abuse of discretion occurred.

The court of appeals did not question the district court's findings that "delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence" and that "exploration will not significantly restrict subsistence resources" (Pet. App. 43a). Instead, the court of appeals faulted the district court because, having found that there was a strong likelihood that the Secretary had violated Section 810, the district court had a "duty to issue an injunction" (Pet. App. 15a). According to the court of appeals (*id.* at 15a, 19a-21a), Congress intended federal courts to presume that respondents would be "irreparabl[y] harm[ed]," absent injunctive relief, and that the "public interest" automatically favored issuance of such relief. Thus, the sole basis upon which the court of appeals' reversal of the district court's denial of preliminary injunctive relief could be upheld is that Section 810 evinces specific congressional intent to limit the traditional equitable discretion of federal courts to deny the issuance of preliminary injunctive relief even where, as in this case, the movants have failed to establish either that irreparable harm would otherwise result or that the public interest favors such an extraordinary remedy.[1]

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[1] The court of appeals did reject the district court's conclusion that the "public interest" favored rejection of respondents' request for injunctive relief (see Pet. App. 23a n.2 ("Congress has chosen the protection of subsistence life over oil exploration")), but as dis-

Respondents nonetheless invite (Br. 42-44) this Court to reconsider the district court's findings that exploration poses no danger of irreparable harm to subsistence uses and that an injunction would cause the federal government irreparable harm. Relitigation in this Court of factual matters previously decided by the trial court, and not found to be clearly erroneous by the court of appeals, however, is inappropriate. In any event, the district court's findings are fully supported by the record in this case, particularly by the similar findings contained in the Department's Section 810 evaluation (see Pet. App. 103a, 106a). Respondents, moreover, cannot rely on predictions of events that might occur, if at all, only at a later stage (development and production) to dispute findings concerned solely with the exploration stage (see Resp. Br. 43 nn.33 & 34).[2] Finally, respondents' contention (Br. 42) that the federal government failed to establish that an injunction would harm any "governmental proprietary interest" is beside the point. Where, as in this case, the government has established that injunctive relief would irreparably harm "this nation's quest for new oil resources and energy independence" (Pet. App. 43a)—an interest of explicit congressional concern (see 43 U.S.C. 1332 (3))—the government need not also show any injury in its proprietary capacity.[3]

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cussed in our opening brief (Br. 25-26 & n.16), that ruling was erroneous as a matter of law.

[2] Respondents cannot rely on any asserted inadequacy in the environmental analysis regarding leasing to supply a basis for enjoining exploration, because the latter is a distinct planning phase. Cf. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407 n.16 (1976). Respondents notably never challenged, pursuant to 43 U.S.C. 1349(c), the Secretary's approval of the exploration plans in the two lease sale areas (see Fed. Pet. Br. 6, 9).

[3] Respondents (Br. 42) incorrectly state that the government "[t]acitly conced[ed] that [it] would suffer no harm if the courts authorized injunctive relief." In fact, the Secretary identified two types of irreparable harm that an injunction would cause: (1) irreparable harm to efforts under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. II) 1331 *et seq.*, to assess expedi-

b. Respondents alternatively argue (Br. 44-48) that the court of appeals' decision is correct because Congress intended to limit the traditional equitable jurisdiction of federal courts to fashion remedies to redress violations of Section 810 of ANILCA. To support this view, respondents and their supporting amici point out that Section 810's procedural requirements are mandatory and must be complied with prior to the particular disposition of public lands to which they relate. See, *e.g.*, Resp. Br. 46-48; Amici California, et al., Br. 14-17; Amici NRDC, et al., Br. 16-17. As explained in our opening brief (Br. 22-27), however, neither the obligatory nature of Section 810's procedural requirements nor the timing of their application sufficiently evinces congressional intent to circumscribe the traditional authority of a federal court to fashion a remedy that is responsive to the equities of a particular case.

Most fundamentally, respondents and their supporting amici have confused the threshold question of whether a mandatory statutory requirement has been violated with the distinct and separate inquiry of whether Congress has intended to require courts to enforce certain remedies once such a violation has been established in a particular case. We do not dispute that Section 810's procedural requirements are mandatory. Nor do we contest that Congress intended that Section 810's procedural requirements would be met prior to the particular decision of the Secretary to which they relate. As discussed in our opening brief (Br. 19-21), we posit only that under this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), neither factor suffices to show that Congress intended to curb the traditional authority of the federal courts, once a violation of Section 810 has been estab-

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tiously the extent of oil and gas resources offshore Alaska; and (2) irreparable harm to efforts to gather geological information necessary for planning the next lease sale in Norton Sound. See Fed. Defs. Opp. to Plaintiffs' Mot. for Preliminary Injunction 25-28; Fed. Appellee's Br. 44-47 (*Gambell II*).

lished, to fashion remedies that are responsive to the facts of the particular case at hand.[4]

Respondents and amici argue that this case, unlike *Romero-Barcelo* and like *TVA* v. *Hill*, 437 U.S. 153 (1978), involves an "absolute" duty and, therefore, as in the latter case, Congress must be deemed to have "specifically required" issuance of sweeping injunctive relief and to have barred district court consideration of the application of traditional equitable principles to the facts of the case.[5] Respondents' analysis is flawed, however, because the controlling question is not whether a statutory duty is "mandatory" or "absolute"; the statutory prohibition at issue in *Romero-Barcelo*—Section 301 of the Clean Water Act, 33 U.S.C. 1311(a) (see 33 U.S.C. 1323(a))—was as uncompromising in nature as Section 810 and did not prevent this Court from concluding in that case that injunctive relief was not automatically required. See 456 U.S. at 313 ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

Instead, as we explained in our opening brief (Br. 21-22), the controlling issue in this case is whether a non-injunctive remedy (or even a narrowly-drawn injunctive remedy) may be fashioned that "neither ignore[s] the statutory violation nor undercut[s] the purpose and function of the [relevant statutory provision]" (*Romero-Bar-*

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[4] Cf. *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 6 ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended for the agency to lose its power to act.").

[5] Respondents apparently abandon the two other grounds on which the court of appeals purported to distinguish *Romero-Barcelo* (see Pet. App. 22a-23a & n.2): (1) "in enacting Section 810, Congress has chosen the protection of subsistence life over oil exploration" and (2) *Romero-Barcelo* involved a permanent rather than a preliminary injunction. See Fed. Pet. Br. 25 n.14, 25-26 & n.16.

*celo*, 456 U.S. at 315). On this basis, in *TVA* v. *Hill*, this Court inferred congressional intent to withdraw the district court's equitable discretion because the very objects of the relevant statute's substantive provisions, which, unlike this case, flatly banned certain adverse impacts (see 456 U.S. at 314), would have been irretrievably jeopardized. By contrast, here, as we have shown (see Fed. Pet. Br. 23-27), and as the district court found (Pet. App. 43a), continued exploration while the Secretary reexamines potential impacts on subsistence uses "will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent" (*ibid.*).

In addition, there is no reason to assume that the procedural objectives of Section 810 will be subverted, as respondents and amici claim, by allowing continuing exploration. As described in our opening brief (Br. 4-5, 7-8, 9), the Department of the Interior had already given substantial consideration to subsistence impacts prior to holding the two lease sales and, at the time of the district court's ruling, had reevaluated subsistence under the specific dictates of ANILCA. The Secretary's willingness to comply with *Gambell I*, coupled with his continuing "power to control and shape the off-shore leasing process" (Pet. App. 43a), flatly contradicts amici's unsubstantiated concern that continued exploration will "[destroy] the integrity of the decision-making process" (Amici California, et al., Br. 19).[6]

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[6] Contrary to Amici NRDC's argument (Br. 18 & n.10) that the Secretary's continuing authority to remedy adverse subsistence impacts is sharply limited, subsistence impacts plainly qualify under 43 U.S.C. 1334(a)(2)(A)(i) as a type of "serious harm or damage to life (including fish and other aquatic life) * * * or to the marine, coastal, or human environment" that may justify lease cancellation. In addition, NRDC ignores that the Secretary possesses the authority to take steps short of lease cancellation, such as disapproval of production and development plans, to respond to subsistence concerns. See 43 U.S.C. 1351(h)(1); see also *Village of False Pass* v. *Clark*, 733 F.2d 605, 614-615 (9th Cir. 1984).

Finally, the contentions of respondents and amici prove too much. Under their view, the only appropriate remedy in this case would be to void the lease sale itself because any "post hoc" compliance would subvert the purposes of Section 810. See, *e.g.*, Amici NRDC, et al., Br. 11 ("Pre-decision consideration is the raison d'etre of section 810(a), and allowing post hoc compliance * * * is unquestionably contrary to the purposes of Section 810."); Amici California, et al., Br. 16.[7] Under that view, even the Ninth Circuit's standard for the issuance of injunctive relief—which allows for denial of injunctive relief that would cause environmental harm or disrupt long-term contracts (see Pet. App. 16a-17a)—would be impermissible.[8] Presumably for this reason, respondents ultimately acknowledge that Congress did not intend to require that a court void the lease sale in all instances and specifically admit that "[i]f the Secretary can approach a post-sale compliance effort with an open mind, and the tribal villages submit that he cannot, the proper remedy is an order maintaining the status quo until he complies" (Resp. Br. 48). Having accepted the principle that a remedy of post-sale compliance (without voiding the lease sale) is not necessarily inconsistent with Section 810's purposes, respondents, however, fail to explain why continued exploration may not similarly be acceptable in

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[7] The argument of Amici NRDC, et al. (Br. 12-14) and Amici California, et al. (Br. 17-18) that courts must grant injunctive relief for violations of mandatory procedural requirements in order to avoid breaching separation of powers principles is hopelessly overbroad. In any event, essentially the same argument was squarely rejected by this Court in *Romero-Barcelo*.

[8] Notably, the court of appeals never explains the basis for its creation of these two exceptions to its otherwise sweeping per se injunction rule. These exceptions, however, confirm our view that the mandatory nature of Section 810's procedural requirements is relevant to the threshold question of whether Section 810 has been violated but does not answer the question of what is an appropriate remedy to address a violation in a particular case.

some cases.[9] Respondents, therefore, are left only with their wholly unsubstantiated accusation that the Secretary cannot, in their view, keep an "open mind" in this particular case (*ibid.*). The record provides no support for this allegation of bad faith directed against the Secretary.[10]

2. In our opening brief (Br. 27-36), we demonstrated that respondents' claim that Section 810 of ANILCA applies to the OCS is contradicted by the language of ANILCA, its statutory purposes, and its legislative history. We further showed (Br. 36-43) that respondents' claim that any ambiguity in the geographic scope of Section 810's application should be resolved in favor of the interests of Native Alaskans was misdirected both because no ambiguity exists in the first instance and because, in any event, the canon of statutory construction favoring the resolution of ambiguities in favor of Indians has little bearing on a legal issue that is not peculiar to the interests of Native Alaskans. Respondents, for the most part, do not address the affirmative points made in our brief. Perhaps most notably, neither respondents nor the State of Alaska, as amicus curiae, seriously disputes

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[9] See, *e.g.*, *Alaska* v. *Andrus*, 580 F.2d 465, 485-486 (D.C. Cir.) (injunction barring OCS exploration inappropriate, notwithstanding NEPA violations, because Secretary's opportunity to choose among alternatives not dependent upon cessation of exploration), vacated in part on other grounds, 439 U.S. 922 (1978).

[10] Respondents also wrongly claim (Br. 40-41) that the Secretary invited a preliminary injunction against exploration in *Gambell I*. *Gambell I* concerned only Lease Sale 57 and did not include a challenge to exploratory drilling. Hence, when the Secretary contended in *Gambell I* that, even if a violation of Section 810 had occurred, "there is no need to undo what has already been done[;] [t]he proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply" (Pet. App. 3a), the Secretary was not "requesting" an injunction, but was merely arguing against rescission of the sale. No doubt for this reason, the court of appeals in *Gambell II* refers to the Secretary's brief in *Gambell I* only in its recitation of the facts (see *ibid.*) and in no manner bases its decision on the ground suggested now by respondents.

our contention that the term "public lands" has traditionally applied only to onshore holdings of the federal government.[11] In this reply, therefore, we need address only a few discrete arguments set forth in respondents' brief.[12]

a. Respondents and amicus Alaska attempt to avoid the force of our argument that areas of the OCS are not "public lands" within the meaning of ANILCA—because they are not "lands the title to which is in the United States" (16 U.S.C. 3102(2))[13]—by contending (Resp. Br. 22-24; Amicus Alaska Br. 12-13) that "lands" includes "interests therein" (16 U.S.C. 3102(1)) and that the United States does claim title to the oil and gas resources within the OCS. Accordingly, respondents argue, leasing of the mineral resources constitutes a disposition of "public lands." Respondents' statutory patchwork, however, is flawed in several fundamental respects.

First, "public lands" is defined as land "situated in Alaska" (16 U.S.C. 3102(3)) and, like the OCS itself,

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[11] Nor could they because, as explained in our opening brief (Br. 29-30), the limited nature of sovereign interests in the OCS is an important aspect of international law. See *The United Nations Convention on the Law of the Sea*, art. 77 (1982); 19 Weekly Comp. of Pres. Doc. 383-385 (Mar. 10, 1983). Indeed, a contrary view would be potentially inconsistent with the settled rights of all nations to undertake such essential activities as the laying of submarine cables and pipelines on the OCS. See *Law of the Sea*, art. 79; 19 Weekly Comp. of Pres. Doc., *supra*, at 384-385.

[12] We do not address respondents' initial lengthy argument (Br. 12-21) that they possess aboriginal title to portions of the OCS because that issue is the subject of their cross-petition in No. 85-1608; this Court has not yet acted on that cross-petition and, therefore, the issue is not before the Court in this case. See Sup. Ct. R. 34.1(a). In addition, as explained at length in our opposition to that cross-petition (at 5-9), the aboriginal title issue has no bearing on the geographic scope of Section 810, which is at issue in this case.

[13] Contrary to respondents' contention (Br. 23 n.24), we are not raising a separate issue concerning "title." The question of "title" is simply part of the analysis of the broader question whether "public lands," as used in ANILCA, includes the OCS, which is an issue that was both briefed in and decided by the courts below.

the mineral resources within the OCS are, by definition, outside Alaska's three-mile seaward boundary (even as far as 350 miles). See Fed. Pet. Br. 29. Shifting the focus away from the seabed and to the mineral resources does not remove this threshold obstacle to respondents' claim. Second, respondents' contention that the United States claims title to the mineral resources of the OCS rests on a false premise because, while Congress asserts its sovereign right to control the development of those resources (including the receipt of royalty payments), Congress has carefully avoided claiming formal title to the mineral resources of the OCS. See, *e.g.*, 43 U.S.C. 1302.[14]

b. Respondents' argument (Br. 24) that "Congress routinely asserts that the United States holds title to the OCS for purposes of domestic legislation" is similarly unpersuasive. To be sure, Congress has on a few isolated occasions expressly excluded the OCS from the definition of "public lands," out of an apparent abundance of caution, but that hardly demonstrates that Congress has abandoned the distinction it has historically drawn between "title" to and "jurisdiction and control" over the OCS.[15] Indeed, as described in our opening brief (Br.

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[14] A formal claim of title to oil and gas in the ground (not yet reduced to possession) need not be a prerequisite to a right to develop those resources. See *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190, 208-209 (1900); 1 H. Williams & C. Meyers, *Oil and Gas Law* §§ 203.I-203.3 (1985).

[15] Neither respondents nor Alaska attempts to rebut our explanation (Fed. Pet. Br. 32 n.20) of why the parenthetical exclusion of the OCS from the coverage of Section 1001(a) of ANILCA does not reveal a congressional assumption that the phrase "Federal lands * * * in Alaska" would otherwise include it. The explicit exclusions in the two other statutes discussed by respondents (Br. 24), the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1702(e), and the Archeological Resource Protection Act (ARPA), 16 U.S.C. 470bb(3), can similarly be explained. A primary impetus for FLPMA was the absence prior to that time of an " 'Organic Act' " for the Bureau of Land Management. See H.R. Rep. 94-1163, 94th Cong., 2d Sess. 41 (1976) (letter from Assistant Secretary of the Interior Horton). Presumably because BLM at that time also administered leasing under the OCSLA, Congress

31), whenever the title issue has been raised, Congress has carefully and consistently stressed that "[t]he U.S. does not hold title to the OCS * * *." See, *e.g.*, H.R. Rep. 99-300, 99th Cong., 1st Sess. 591 (1985). It is not surprising, therefore, that respondents have not cited a single instance in which Congress has included the OCS within the meaning of "public lands" in a federal statute.

c. Respondents' reliance (Br. 26-33) on ANCSA to support their contention that the OCS is "in Alaska" for the purposes of Section 102(3) of ANILCA, is misplaced. As explained at length in our opening brief (Br. 37-39), although both ANILCA and ANCSA employ the phrase "in Alaska" and the two statutes share certain common roots, their statutory contexts are wholly different and indicate different geographic scopes. In particular, in Section 4(b) of ANCSA, 43 U.S.C. 1603(b), the phrase is used in the context of language which extinguished "all" aboriginal title claims, whether on private, state or federal lands, or "submerged land underneath all water areas, both inland and offshore," while in Section 102 of ANILCA, there is no reference to offshore lands, and no broad legislative purpose to encompass all types of claims, wherever located. Compare S. Conf. Rep. 92-581, 92d Cong., 1st Sess. 40 (1971).[16] Indeed, as we pointed out

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expressly excluded the OCS to dispel any possible suggestion that this new "Organic Act" affected OCS leasing. Similarly, Congress likely explicitly excluded the OCS from the geographic scope of the ARPA to ensure preclusion of any federal ownership claims to shipwrecks located on the OCS. Comparable claims had previously been made, and rejected, under the Antiquities Act. See, *e.g.*, *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337-340 (5th Cir. 1978).

[16] Respondents incorrectly suggest (Br. 32-33) that the United States took inconsistent positions on this point in *Gambell I* and in *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985). In *Inupiat*, the United States did not broadly contend that the phrase "in Alaska," by itself, mandated application to the OCS. Instead, we relied, inter alia, on the language of Section 4(b) of ANCSA, which expressly extinguishes claims to "submerged land underneath all wa-

in our opening brief (Br. 36, 40-41), the legislators who passed ANILCA repeatedly stressed their intention not to affect development of the OCS.[17]

d. Respondents also mistakenly contend (Br. 28) that the testimony of the Alaska Federation of Natives (AFN) supports their view of the geographic scope of Section 810. As we explain in our opening brief (Br. 42-43 & n.28), however, the AFN proposal actually confirms our view that all parties assumed that the OCS was outside the scope of ANILCA. Indeed, the very excerpt from the AFN testimony upon which respondents rely (Br. 28) reveals that the AFN urged application of Title VIII of ANILCA only to "subsistence uses on all Federal public lands."[18] In any event, the missing link in respondents'

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ter areas, both inland and offshore," and on Section 4(c)'s extinguishment of all claims "based on" claims to land and water areas "in Alaska," which would necessarily include aboriginal claims to the OCS. See Fed. Defs. Reply Mem. in Support of Mot. for Judgment on the Pleadings at 22-23; see also U.S. Br. 34 & n.22, *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985).

[17] Respondents erroneously contend (Br. 31-32) that those statements regarding the limited scope of ANILCA applied only to nonsubsistence provisions of that Act. In fact, Representative Young of Alaska, when specifically asked about the scope of the subsistence provisions of ANILCA during a 1978 hearing, stated that they encompassed "all Federal lands—and that is two-thirds of the State" (see *Alaska Lands—Part 2: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 449 (1978)). Of course, the reference to "two-thirds of the State" rebuts any suggestion that the congressman intended to include the OCS, which is more than twice the size of the State (see Fed. Pet. Br. 36).

[18] The map to which respondents refer (Br. 29 n.28 citing Pltfs. Exh. I (attached to Pltfs. Mot. for Summary Judgment, *Gambell* v. *Watt*, No. N83-3 (D. Alaska))) in no manner suggests that the natives were entitled to areas of the OCS. As explained in an affidavit submitted by a Department of the Interior official and filed with the trial court in *Gambell I* (see Fed. Defs. Exh. E, at 4 (attached to Fed. Defs. Resp. to Pltfs. Mot. for Summary Judgment)), the boundary lines on the map were protracted across off-

argument, apart from any convincing showing that the AFN believed that Title VIII extended to the OCS, is any showing that *Congress* intended that result. Whatever the subjective intent of the AFN, it is the intent of Congress, and not of the AFN, which is at issue here, particularly because, as respondents readily acknowledge, Congress did not adopt the AFN proposal (see Resp. Br. 29 n.28).[19]

e. Respondents contend (Br. 31) that Congress's inclusion of the Fishery Conservation and Management Act, 16 U.S.C. (& Supp. II) 1801-1802, in the ANILCA savings clause (see 16 U.S.C. 3125(4)) demonstrates legislative intent to extend the geographic scope of Title VIII to the OCS because ANILCA could not affect fishery management unless it applied beyond the territorial sea. The premise of this argument is flawed from the outset, however, because, as even respondents concede (Br. 31), the Fishery Conservation and Management Act applies onshore in some instances (see, *e.g.*, 16 U.S.C. 1801(a)(1) and (b)(1), 1856(b)(1)). Hence, the mere addition of that Act along with several others to a laundry list of statutes that were not to be deemed modified or repealed by Title VIII sheds no light on whether Congress contemplated that Title VIII would apply to the OCS.[20] Of greater sig-

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shore waters simply to indicate native entitlement to various islands and rocks and not to suggest any entitlement to the OCS itself.

[19] In extending the scope of Title VIII beyond conservation units to include all public lands, Congress was simply rendering the geographic scope of ANILCA equivalent to the scope of the withdrawal provisions of Section 17(d)(1) of ANCSA, 43 U.S.C. 1616(d)(1), which, unlike the extinguishment provision of Section 4(b) of ANCSA, plainly apply only to onshore lands (see Fed. Pet. Br. 33). There is no suggestion in the legislative history that Congress intended that ANILCA, including Title VIII, would be broader in scope than Section 17(d)(1) of ANCSA.

[20] Congress added several statutes to the savings clause when it added the Fishery Conservation and Management Act. Compare H.R. 39, 95th Cong., 2d Sess. § 716(4) (Oct. 15, 1978) with H.R. 39, 95th Cong., 2d Sess. § 713 (May 23, 1978); see also Staff of House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., Show-

nificance, however, is that Congress extended subsistence protection to "public lands" in Alaska at the same time that Congress was considering the OCSLA Amendments of 1978. Had Congress intended that "public lands" were to include the OCS, as respondents claim, there surely would have been some discussion of the relationship between the two statutory schemes; yet there is none.[21]

f. Finally, Alaska's contention (Br. 17-19) that our view of ANILCA's geographic scope would subvert the congressional purpose of protecting subsistence uses misapprehends ANILCA's statutory focus. In ANILCA, Congress plainly did not intend to protect all subsistence uses and resources in Alaska. Instead, Congress sought only to protect those uses and resources occurring on "public lands," and, thus, specifically declined to extend similar protection to State, private, or native lands, including those State lands located within the three mile band of submerged offshore land belonging to Alaska. See gen-

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ing The Substitute [H.R. 39] Adopted By The Subcomm. On General Oversight And Alaska Lands 95 (Comm. Print 1978).

[21] Indeed, the scant legislative history concerning the relationship between the two statutes reveals that members of Congress intended to keep the two programs separate. For example, when a witness testified at an ANILCA hearing in favor of native organization involvement in OCS development, Representative Seiberling responded that "this subcommittee [on General Oversight and Alaska Lands] does not have jurisdiction over either coastal zone management or Outer Continental Shelf development," and suggested that "since we have reported out an OCS bill with respect to oil leasing [the OCSLA Amendments of 1978], perhaps we can review that in light of some of these comments." *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 1st Sess. Pt. XIII, 18-19 (1977). Possible conflicts with federal ocean policy were also a primary factor behind congressional rejection of efforts to extend ANILCA refuge protections seaward. See S. Rep. 95-1300, 95th Cong., 2d Sess. 149-150 (1978); see also 124 Cong. Rec. 18025-18026 (1978) (ANILCA was "intended to be a land bill") (remarks of Sen. Stevens).

erally 16 U.S.C. 3111, 3112.[22] Whether Alaska has decided to enact legislation to protect subsistence resources in the three-mile belt of ocean under its control is, therefore, irrelevant to the distinct issue of what Congress intended in ANILCA. We note, moreover, that Alaska does not contend that it has enacted any state law provision equivalent to Section 810.

3. In our opening brief (Br. 43-47), we showed that the court of appeals erred in holding that the mere possibility of a subsistence restriction at the development and production stage requires the Secretary at the leasing stage to fulfill the notice, hearing, and findings requirements contained in the second sentence of subsection 810 (a). In response, respondents mischaracterize our position before this Court, including our view of the relationship of Section 810 to leasing of federal lands.

a. First, respondents wrongly claim (Br. 33) that we have conceded that the Department of the Interior violated the threshold evaluation requirement set forth in the first sentence of Section 810(a). In fact, neither the district court nor the court of appeals questioned the adequacy of Interior's compliance with the subsistence evaluation requirement in preparing the post-sale subsistence analysis for Sale 57 (see Pet. App. 12a-14a),[23] and we

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[22] As we have shown in our opening brief (Br. 35), moreover, inclusion of the OCS within "public lands" is not necessary to protect seagoing subsistence resources, since numerous other federal statutes serve that purpose.

[23] Nor, as respondents allege (Br. 35), did either court "ignore[]" the post-sale analysis for Sale 57, or question the propriety of the Secretary's performance of such an analysis under these circumstances. Contrary to respondents' characterization, that analysis did not amount to a post-hoc explanation prepared for litigation, but was intended to cure the error found by the court of appeals in *Gambell I*. It is commonplace for courts to allow agencies to cure errors in post-hoc proceedings, without voiding completed transactions or interrupting ongoing activities. See, *e.g.*, *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980); *United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1311 (D.C. Cir. 1980). Notably, none of the cases cited by respondents (Br. 35) involved a statutory scheme, such as the OCSLA, where compliance proceeds in stages

have certainly never conceded the point.[24]

b. Respondents (Br. 34, 36) and Alaska (Br. 26, 27, 29-30) also erroneously contend that under our view the Secretary would never need to comply with Section 810 (a)(1)-(3) procedures at the lease stage and, as a result, the word "lease" in Section 810 would be read out of the statute.

We do not contend that Section 810's notice, hearing, and findings requirements are never triggered at the lease sale stage, but only that those procedures are not triggered where, as in this case, there is only a remote possibility of significant subsistence restrictions occurring at a later stage. Where the Secretary could conclude at the lease sale stage that such a significant restriction would occur at a later stage, the additional procedural requirements of Section 810 would have to be met at the lease sale stage.

For this reason, notwithstanding respondents' and Alaska's claim to the contrary, our view of Section 810 would not read the word "lease" out of Section 810. Even more fundamentally, however, the significance of the word "lease" in Section 810 does not turn on whether that provision applies to the lease stage (assuming Section 810 applies to the OCS at all), but rather on what *type* of lease triggers those additional procedural requirements.

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and the results of a post-stage analysis at one stage can inform subsequent decisions made at a later, more critical stage.

[24] Respondents (Br. 34 n.29) confuse our argument, based on the explicit Sale 57 post-sale analysis under Section 810, that Section 810 had been satisfied, with our alternative argument that "substantial compliance" with Section 810 was achieved prior to Lease Sales 57 and 83 on the basis of the assessments included in the environmental impact statements prepared by Interior. The courts below rejected the substantial compliance argument on the ground that the Secretary did not have the mandate of Section 810 "clearly in mind" when he carried out his substantial pre-sale evaluations of subsistence (see Pet. App. 8a, 37a). While we disagree with the courts' elevation of form over substance, we elected not to raise this issue in our petition for a writ of certiorari. Our omission of that issue in our petition, however, certainly does not amount to a concession that the studies underlying the subsistence evaluation were inadequate.

As this Court has explicitly found, a lease under the OCSLA, unlike many *onshore* leases, "entails no right to proceed with full exploration, development, or production," but conveys "only a priority in submitting plans to conduct those activities" (see *Secretary of the Interior* v. *California*, 464 U.S. 312, 339 (1984)). Respondents nonetheless argue (Br. 39) that Section 810's additional procedures must be followed at the OCS lease sale stage because "leasing constitutes an irrevocable commitment of resources." As this Court made clear in *Secretary of the Interior* v. *California*, 464 U.S. at 336-337, however, the grant of a lease under the OCSLA does not include express or implied approval of exploration, development, or production. Respondents' position, therefore, conflicts with the congressional decision, recognized by this Court in *Secretary of the Interior*, to separate the stages of OCS development in order to forestall premature litigation regarding potential environmental effects that might occur, if at all, only at later stages (see *id.* at 341).

c. Finally, respondents' argument (Br. 37-38) that this Court should reject the Secretary's reasonable interpretation of the word "would" in Section 810 is unpersuasive. Respondents do not offer any meaningful support for their view that Congress intended "may" when it said "would." In any event, even if their proposed construction were plausible, the only issue before this Court is whether the Secretary's own construction was reasonable (see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). In this case, the Secretary's determination that "would significantly restrict" means "likely" to significantly restrict constitutes a reasonable interpretation of the statute.[25]

Indeed, the cases concerning the meaning of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C), upon which respond-

[25] We note that the Secretary's standard is certainly more favorable to respondents than other accepted meanings of "would" rejected by the Secretary. For example, contrary to Alaska's suggestion (Br. 30), the Secretary has not taken the position that "would" means a certainty of restrictions.

ents rely (Br. 37-38), not only fail to question the reasonableness of the Secretary's interpretation in this case, but they underscore the propriety of judicial deference to reasonable agency statutory construction. First, Section 102(2)(C) of NEPA does not even employ the word "would." It simply refers to "major Federal actions significantly affecting the * * * human environment." Judicial decisions concerning the meaning of Section 102 (2)(C), therefore, do not support respondents' claim that "would" in Section 810 should be construed to mean "may." In addition, there are explicit indications in Section 102(2) that "may" is the relevant standard. See, *e.g.*, 42 U.S.C. 4332(2)(A) ("decisionmaking which *may* have an impact on man's environment") (emphasis added); 42 U.S.C. 4332(2)(D)(iv) ("any action or any alternative thereto which *may* have significant impacts") (emphasis added). No comparable indications exist in Section 810. Finally, the federal agency responsible for NEPA's implementation has construed Section 102 to turn on the "may" standard (see 40 C.F.R. 1508.3) and that agency construction is entitled to substantial judicial deference. Here, the Secretary has construed the word "would" in Section 810 to mean "likely to" and that plainly reasonable interpretation should similarly be entitled to judicial deference.

4. In our opening brief (Br. 47-49) we argued that the decision of the court of appeals in *Gambell I* (even if correct, which we contest) should not be applied retroactively to lease sales held before the court of appeals' decision. Respondents do not contest our argument (Fed. Pet. Br. 47-49) that retroactive application would, without furthering ANILCA's statutory purposes, disrupt OCS exploration and development as well as financial arrangements made in reliance on the Secretary's prior construction. Instead, respondents argue (Br. 49) that retroactivity is not involved in this case, because "the legal challenges were made *before* the parties acted" (emphasis in original). This claim lacks merit.

The legal challenge to Lease Sale 83 was filed more than a year after that sale and almost four months after

the first exploration plan was approved (see Fed. Pet. Br. 8-9). Consequently, the legal challenge was made *after* and not "before the parties acted." [26] In addition, it is no bar to our retroactivity claim that *Gambell I* involved the very challenge to Lease Sale 57 at issue in this case. In *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 718-723 (1978), this Court held that retroactive relief was improper in a case, such as this one, in which the principle of law upheld was first announced by the lower courts in that same case. We submit that similar considerations govern this case (see Fed. Pet. Br. 48-49).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Department of the Interior*

DECEMBER 1986

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[26] As we explained in our opening brief (Br. 48-49), retroactive application of *Gambell I* to Lease Sale 83 would be particularly inequitable because at the time that lease sale was held, the district court in the Lease Sale 57 case had ruled that Section 810 did not apply.

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Nos. 85-1239, 85-1406

In The
# Supreme Court of the United States
October Term, 1985

ARCO ALASKA, INC.;
AMOCO PRODUCTION COMPANY, et al.,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,
*Respondents.*

DONALD P. HODEL, Secretary of the Interior;
and UNITED STATES DEPARTMENT
OF THE INTERIOR,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS

### INTERESTS OF AMICI

Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance (ASIA) are organizations which represent a broad spectrum of the public vitally interested in the fair and accurate interpretation of the environmental and conservation statutes that guide

the exploration for and development of Alaska's vast offshore petroleum energy resources. RDC and ASIA represent individuals and organizations, both private and governmental, whose economic survival will be, and is now being, severely and negatively impacted by erroneous legal rules and statutory constructions emanating from the United States Court of Appeals for the Ninth Circuit's decision in this case.

The Ninth Circuit's announced rule of a per se requirement of injunctive relief upon a prima facie showing of violation of an environmental or conservation statute has operated to unreasonably restrict the opportunities of RDC and ASIA's members to pursue their livelihoods and count upon stable sources of income. The Ninth Circuit's construction of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, has the capacity for producing negative effects on the Alaska and national economies by requiring the Secretary of the Interior to attempt to evaluate effects of outer continental shelf (OCS) exploration and development or production at a time in the leasing process when such effects are uncertain and speculative at best. Finally, the Ninth Circuit's decision in this case has ignored legislative history and thereby subverted congressional intent regarding expeditious OCS inventorying and development. The Ninth Circuit has attempted to redefine the public and national interest in a manner unintended by Congress and clearly harmful to amici's interest in their members' ability to pursue their livelihood. Consent for the filing of this brief has been obtained from the parties and previously lodged with the Court.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 774 F.2d 1414 (9th Cir. 1985).

## STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in petitioners' opening brief.

## SUMMARY OF ARGUMENT

1. The Ninth Circuit has used the case under review as a vehicle for announcing a per se rule of automatic injunctive relief upon a prima facie showing of violation of an environmental or conservation statute. This local rule is in direct conflict with the guidance furnished by this Court in *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), for determining the appropriate conditions for limiting the equitable discretion of federal courts.

2. In its decision in *Secretary of the Interior v. California,* 464 U.S. 312 (1984), this Court recognized that the phased or tiered structure of federal decision making under the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1331, *et seq.,* reflects a conscious choice by Congress to key environmental review of OCS development activities to those tiered stages of decision making. The decision by the Ninth Circuit in the case under review creates a single anomalous exception to this carefully crafted structure of federal review for the evaluation of subsistence use impacts mandated by Section 810(a) of the

Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a). The Ninth Circuit's justifications for this exception are unavailing and, in fact, result in rendering portions of ANILCA superfluous.[1]

3. The Ninth Circuit announced in the case under review that Congress in enacting Section 810(a) of ANILCA intended to create a substantive preference for the preservation of subsistence uses over the meeting of national OCS inventorying and development requirements. This assertion is unsupported by the legislative history of the Act and constitutes a clear usurpation of Congress' unique role as the setter of national policy.

## ARGUMENT

### I

### THE NINTH CIRCUIT'S PER SE RULE FOR THE GRANTING OF INJUNCTIVE RELIEF DIRECTLY CONTRADICTS THIS COURT'S RULING IN WEINBERGER v. ROMERO-BARCELO

#### A. The Ninth Circuit Has Established a Per Se Rule for Granting Injunctive Relief When an Environmental or Conservation Statute Appears to Have Been Violated

Despite respondent People of the Village of Gambell's protestations to the contrary,[2] it is clear beyond a doubt

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[1] Amici are in full agreement with petitioners that the Ninth Circuit erred in ruling that ANILCA applies to the OCS, and adopt petitioners' statement of this issue and their arguments addressed to it. Amici only argue in the alternative that if this Court should accept the Ninth Circuit's position in applying ANILCA to the OCS, that court's application is contrary to the requirements of *Secretary of the Interior v. California*.

[2] *See, e.g.*, respondent's Brief in Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 28.

from the language employed by the Ninth Circuit in *People of the Village of Gambell v. Hodel* (*Gambell II*), 774 F.2d 1414 (9th Cir. 1985), as well as from other recent cases in the Ninth Circuit involving the granting of injunctive relief,[3] that the Ninth Circuit has fashioned a per se rule requiring the granting of an injunction when the moving party succeeds in making a nonfrivolous showing of the violation of an environmental or conservation statute.

In *Gambell II* the Ninth Circuit reviewed the District Court's discretionary refusal to enjoin exploratory drilling under Lease Sale 57 in Norton Sound and Lease Sale 83 in the Navarin Basin, both off the coast of Alaska. *Gambell II*, 774 F.2d at 1417-18. The District Court's action was based on its specific findings:

> "(1) Movants have established a strong likelihood of success on the merits.
>
> "(2) The balance of irreparable harm does *not* favor the movants.
>
> "(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS [outer continental shelf] oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent." *Id.* at 1418 (emphasis in original).

Thus, the District Court engaged in just that process intended to "'balance the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction' "

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[3] *See, e.g., Steamboaters v. Federal Energy Regulatory Commission*, 777 F.2d 1384 (9th Cir. 1985); *Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985); *Tribal Village of Akutan v. Hodel*, No. 86-3512 (9th Cir. 1986) (order sustaining preliminary injunction).

which this Court has consistently required. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982), *citing Yakus v. United States,* 321 U.S. 414, 440 (1944). This process proved unacceptable to the Ninth Circuit.

The Ninth Circuit found the District Court's refusal of injunctive relief "not consistent with the law of this circuit," *Gambell II,* 774 F.2d at 1422, because the District Court had denied the requested injunction "[n]otwithstanding its [*i.e.,* the District Court's] determination that the Secretary violated the procedural requirements of section 810(a) of the Conservation Act." *Id.* The District Court's "inconsistent" exercise of the usual equitable discretion was improper because the law of the Ninth Circuit is that "[a]n injunction is the *appropriate remedy* for a substantive procedural violation of an environmental statute." *Id., citing Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985) (emphasis added). Once a prima facie violation is made out, a District Court in the Ninth Circuit commits legal error in not awarding injunctive relief.

Furthermore, the dimensions of any remaining "discretion" in the District Court under the Ninth Circuit's "appropriate" standard shrink to practical nonexistence; it is clear from *Gambell II* that "appropriate" actually means "required." Thus, in concluding that the District Court's justifications for denying the requested injunction were "inappropriate," 774 F.2d at 1423, the Ninth Circuit decided that none of the proffered justifications

> "excuse its *duty to issue an injunction* in light of its determination that there was a strong likelihood that the Villages would prevail in their contention that section 810(a) of the Conservation Act had been violated." *Id.* (emphasis added).

Once the appropriate showing of violation is made, the duty to enjoin matures simultaneously.

Moreover, even were this Court inclined to overlook language that speaks of equitable remedies in terms of an absolute, nondiscretionary "duty," the Ninth Circuit's overall approach completely inverts the scheme of equitable relief that this Court has painstakingly created through the years. In *Weinberger v. Romero-Barcelo, supra,* the Court noted that "[i]t goes without saying" that equitable remedies do not issue " 'as of course.' " *Id.* at 311, *citing Harrisonville v. W. S. Dickey Clay Manufacturing Co.,* 289 U.S. 334, 337-38 (1933). " 'Flexibility rather than rigidity has distinguished it [equitable relief].' " *Weinberger,* 456 U.S. at 312, *citing Hecht Company v. Bowles,* 321 U.S. 321, 329 (1944). This must be so because "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger,* 456 U.S. at 313, *citing Tennessee Valley Authority v. Hill, (TVA),* 437 U.S. 153, 193 (1978), *Hecht v. Bowles,* 321 U.S. at 329.

But just this proscribed sort of mechanical regimentation is forced upon district courts in the Ninth Circuit when the apparent violation of an environmental or conservation statute is at issue. Rather than affording the District Court sitting in equity that " 'full opportunity . . . to treat enforcement proceedings . . . in accordance with their traditional practices as conditioned by the necessities of the public interest,' " *Weinberger,* 456 U.S. at 320, *citing Hecht,* 321 U.S. at 330, as this Court has required, the practice of the Ninth Circuit actually requires the District Court to attempt, however futilely, to "*justif*[*y*] *the denial* of a preliminary injunction," *Gambell II,* 774 F.2d

at 1425 (emphasis added), when a showing of probable success on the merits has been made.[4] Clearly, the Ninth Circuit's unique rule constitutes a per se requirement of injunctive relief.

### B. The Ninth Circuit's Per Se Rule Subverts the Statutory Analysis Required By This Court in Weinberger v. Romero-Barcelo

In *Weinberger v. Romero-Barcelo, supra,* this Court overturned a decision of the First Circuit requiring the District Court for the District of Puerto Rico to issue an injunction for a violation of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251, *et seq.* In reaching its decision overruling the First Circuit, the Court considered and rejected arguments that the decision then *sub judice* was controlled by the Court's prior decision in *TVA v. Hill, supra. See Weinberger,* 456 U.S. at 310, 314-18.

Rather than blindly relying on the result in *TVA v. Hill,* the Court began its analysis with an examination of traditional equitable principles, *see Weinberger,* 456 U.S. at 311-13, noting that the traditional discretion of federal equity courts was subject to modification by Congress: "Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." *Id.* at 313, *citing Hecht,* 321 U.S. at 329.

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[4] The futility derives from the extreme unlikelihood that a District Court will be able to bring any particular set of factual circumstances within the only two grounds for denial, viz., that an injunction will actually harm the environment or interrupt the performance of long-term contracts. *See Gambell II,* 774 F.2d at 1424-25.

The modification power reposed in Congress necessitates a scrutiny of the statutory scheme (for which enforcement is being sought) for guidance on the dimensions of equitable discretion under the statute: " 'Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a *clear and valid legislative command.*' " *Weinberger,* 456 U.S. at 313, *citing Porter v. Warner Holding Co.,* 328 U.S. 395 (1946) (emphasis added). The Court's analytical framework was set by the conclusion that the statutory scheme must be explicit in its intent to limit equitable discretion: " '*Unless a statute in so many words, or by a necessary and inescapable inference,* restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.' " *Id.* (emphasis added).

The Ninth Circuit in *Gambell II* made no use whatsoever of this method. Rather, the principle from which ANILCA's requirements were viewed was that "a preliminary injunction should issue where a federal agency has violated the procedural requirements of an environmental protection or conservation statute," *Gambell,* 774 F.2d at 1428, *i.e.,* without the *Weinberger* scrutiny of the specific equitable orientation of the statute at issue. That this is the case in the Ninth Circuit is well illustrated by the contradictory position reached by the court concerning the unsuitability of the Secretary's National Environmental Policy Act (NEPA) subsistence use impact study to fulfill the subsistence use evaluation required by ANILCA. *See Gambell II,* 774 F.2d at 1420-22.

While denying the Secretary the opportunity to utilize the subsistence use impacts study performed for NEPA

compliance to satisfy the subsistence use evaluation required by ANILCA, the court noted that

> "[w]e previously have held that 'compliance with one environmental statute does not assure compliance with another.' Where each statute mandates separate and distinct procedures, compliance with the requirements of one does not compel the conclusion that the provisions of the other statute were considered. Neither the Environmental Act [NEPA] nor the Lands Act [Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA)] sets forth procedures to ensure the protection of subsistence needs and uses. In contrast, the Conservation Act [ANILCA] was created 'to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.'
>
> "As we noted in *Gambell I* [*People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984)], 'Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife "is essential to [their] existence".' *The separate and distinct procedures* set forth in section 810(a) of the Conservation Act were enacted to fulfill that purpose. *The Environmental Act and the Lands Act do not, by their terms, seek to advance the same Congressional goals.*" *Gambell II*, 774 F.2d at 1421 (emphasis added; citations omitted).

Yet these widely differing statutes receive the same treatment without *Weinberger* scrutiny on the question of the propriety of preliminary injunctive relief. The court recognizes that the congressional goals to be achieved and the procedures required to meet those goals were "separate and distinct," but in furtherance of its per se rule ignores these differences when the issue is the equitable discretion of a reviewing court. This method does not so much violate *Weinberger* as loftily ignore it.

The clear teaching of *Weinberger* is that such an *a priori* rule limiting equitable remedies under a statutory scheme is immediately suspect. The scheme itself must first be examined for indications of congressional intent regarding the extent of permissible equitable relief. The Ninth Circuit's per se rule renders this required statutory scrutiny impossible of accomplishment. In its disregard of congressional intent and complete indifference to the careful weighing of inferences flowing from a statute's internal structure that the Court relied on in *Weinberger*, the Ninth Circuit's insensitive proactive approach is completely alien to this Court's express requirements.

## II

## THE DECISION OF THE NINTH CIRCUIT REQUIRING THE FULL PROCEDURAL APPARATUS OF ANILCA § 810(a)(1)-(3) AT THE LEASE SALE STAGE OF OCS DEVELOPMENT FOR SUBSISTENCE USE IMPACTS THAT MAY OCCUR ONLY AT SUBSEQUENT STAGES OF EXPLORATION AND PRODUCTION/DEVELOPMENT IS CONTRARY TO THIS COURT'S RULING IN SECRETARY OF THE INTERIOR v. CALIFORNIA

### A. The Secretary's Subsistence Use Evaluation Meets This Court's Requirements for Tiered Environmental Review of OCS Activities

In *Secretary of the Interior v. California*, 464 U.S. 312 (1984), this Court reviewed the requirements of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451, *et seq.*, in the context of OCS development activities. In order to resolve the issues then before it, the Court found it appropriate to examine the structure and policy of OCSLAA, 43 U.S.C. § 1331, *et seq.*, "for a clarification

of the differences between a lease sale and the approval of a plan for 'exploration,' 'development,' or 'production.'" *Secretary of the Interior v. California*, 464 U.S. at 336. The Court found that in recognizing the above differences "Congress had thus taken pains to separate the various federal decisions involved in formulating a leasing program," *id.* at 340, and the separate federal decisions represented "distinction[s] that Congress has codified *with great care.*" *Id.* at 336 (emphasis added). The decision of the Ninth Circuit in *Gambell II* completely obliterates these carefully crafted congressional distinctions.

The Supreme Court identified the effect and purpose of the tiered structure of OCS activities under OCSLAA as follows:

> "Each stage involves *separate regulatory review* that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS. *And each stage includes specific requirements for consultation with Congress, between federal agencies, or with the States.*
>
> . . . .
>
> ". . . [T]he purchase of an OCS lease, standing alone, entails *no right to explore for, develop, or produce oil and gas resources on the OCS.* . . . The stated reason for this four-part division was *to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production.*" *Secretary of the Interior v. California*, 464 U.S. at 337, 340-41 (emphasis added).

The Court could not have said more plainly that regulatory review, including environmental review of OCS activities, was to proceed at the pace of the activities themselves as

permitted under OCSLAA. Environmental review conducted in this manner would minimize threats of unripe litigation. The Ninth Circuit in *Gambell II* has consciously ignored the teaching of *Secretary of the Interior v. California* with precisely those undesirable results the Court foresaw.

The Secretary's Section 810(a) evaluation for Lease Sale 57 specifically found that it "has not and will not significantly restrict subsistence uses." *See* Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (filed by petitioner Secretary of the Interior in this matter), Appendix J at 85a. Relying on *Secretary of the Interior v. California,* the evaluation indicated that the extent of its required Section 810(a) inquiry was limited to considering the effects of the lease sale stage of OCS development,[5] but went on to include a hypothetical assessment of subsistence use restrictions at the subsequent stages of exploration and development/production as well. Appendix J at 84a. The evaluation justified this treatment by noting:

> "Since each of these stages has a different probability of occurring as well as a different potential for affecting the environment, this division will also better identify the possible restrictions of each stage on subsistence uses. Future stages are evaluated to the extent possible at this time. *We emphasize that, at present, no development and production plans have been proposed.* For this reason, the discussion of

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[5] "Recent case law distinguishes the lease sale from other stages of OCS development, i.e., exploration, development and production. Thus, we are required to consider at this stage only the effects of the lease sale, and not the effects of exploration or development and production." Appendix J at 84a.

the development & production stage is based on the hypothetical scenarios and oil-spill-risk-analysis included in the 87 FEIS (USDOI MMS 1982).

> "To repeat, however, we are not required to consider anything other than the lease sale (and associated preliminary activities) at this stage. *Therefore, the discussion of subsequent stages (exploration, development & production) should not be viewed as the final 810 evaluation for those stages, and should not be regarded as a statement of events which will actually occur.*" *Id.* at 84a-85a (emphasis added).

Thus, the Secretary's methodology in evaluating possible subsistence use restrictions as a result of OCS activities tracked precisely with this Court's assessment of congressional intentions under OCSLAA.

### B. The Ninth Circuit's Failure to Follow Secretary of the Interior v. California Is Unjustifiable

But the Ninth Circuit was not persuaded. Noting that the Secretary's necessarily hypothetical evaluation of *future* subsistence use restrictions at the *development/production stage* had identified possible significant restrictions, the court required the full panoply of Section 810(a)(1)-(3) procedures to be undertaken at the *lease sale stage:*

> "We made it clear in *Kunaknana* [*v. Clark,* 742 F.2d 1142 (9th Cir. 1984)] that under the express language of section 810(a)(3), the Secretary was required to comply with the notice and hearing requirements of the statute to determine *inter alia* whether ' " such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands." ' 742 F. 2d at 1150-51 (*quoting* section 810(a)(3))." *Gambell II,* 774 F.2d at 1422.

The court identified two reasons for not following the tiered analysis mandated by this Court in *Secretary of the Interior v. California, supra:* the inapplicability of the analysis found in *Secretary of the Interior;* and the control, by way of exception, of the "specific" requirements of ANILCA over the "general" requirements of OCSLAA. *Gambell II,* 774 F.2d at 1422. These asserted justifications for not conforming to this Court's requirements are erroneous for the following reasons.

### 1. The Tiered Decision Making Structure of OCSLAA Controls ANILCA Procedures Exactly As It Controls Endangered Species Act and National Environmental Policy Act Procedures

There is no basis for the position that the Court's analysis of congressional purpose underlying the four-part division of development activities on the OCS is limited to the interactions of OCS activities with the single statutory scheme of the CZMA. The fact that the Court in *Secretary of the Interior v. California* did not have before it the requirements of Section 810(a) of ANILCA is immaterial; the Court was announcing the effects of the 1978 amendments to the Outer Continental Shelf Lands Act as much as it was specifying the reach of the CZMA. The attempt to limit the applicability of *Secretary of the Interior* to CZMA-related procedures is arbitrary, superficial, and clearly erroneous.

Moreover, less than 18 months prior to its decision in *Gambell II* the Ninth Circuit had expressed precisely the opposite opinion in a case entirely missing from the *Gambell II* analysis. In *Village of False Pass v. Clark,* 733 F.2d 605 (9th Cir. 1984), the court established the

methodology for applying the procedural requirements of the Endangered Species Act (ESA) and NEPA to OCS activities. In that case the Ninth Circuit had no problem finding that ESA and NEPA procedures were governed by OCSLAA in the manner prescribed by this Court in *Secretary of the Interior v. California:*

> "The Supreme Court recently explained the basic structure of OCSLA in *Secretary of the Interior v. California,* — U.S. —, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984). . . . Although the present case applied OCSLA in a different factual situation, *there is no doubt that we are bound by the Court's analysis of OCSLA." Village of False Pass,* 738 F.2d at 608 (emphasis added).
>
> "Thus, it is clear that OCSLA prescribes three distinct stages for offshore oil and gas activities: leasing, exploration, and development and production. . . . *Our analysis of this case, therefore, requires us to take into consideration the three separate stage approach of OCSLA." Id.* at 609 (emphasis added).

The absence of any reference to this language from *Village of False Pass* in *Gambell II* therefore is the more puzzling. The *Gambell II* court may be understood as either reversing *Village of False Pass sub silentio* or limiting it to the specific statutes at issue in that case. Either interpretation is forbidden by the plain import of this Court's decision in *Secretary of the Interior v. California.*

### 2. The Appeal to Statutory Construction Aids Is Flawed

The principles of statutory construction advanced by the court are inapplicable. In refusing to order compliance with the procedural requirements of Section

810(a)(1)-(3) of ANILCA within the tiered decision-making structure of OCSLAA, the Ninth Circuit found ANILCA to be excepted from the entire OCSLAA process:

> "In the Conservation Act [*i.e.*, ANILCA], however, Congress has expressly provided for a *specific and detailed procedure* to be followed in evaluating the impact on subsistence use of the lease of public land for exploratory activities. . . . 'It is a basic rule of statutory construction that a specific statute controls over a general statute.' . . .
>
> ". . . [T]he specific procedural requirements of section 810(a)(1)-(3)—which are triggered by the threat of a significant restriction of subsistence use—were intended by Congress to serve as *an exception to the general provisions of the Lands Act* [*i.e.*, OCSLAA]." *Gambell II*, 774 F.2d at 1422 (emphasis added; citations omitted).

Aside from the complete incompatibility of this rationale with the *Village of False Pass* decision finding two other equally specific and detailed environmental enactments, ESA and NEPA, to be within the OCSLAA procedural ambit, the stated principle of statutory construction is inapplicable to the interrelationships between ANILCA and OCSLAA.

First, the statement of the rule of specific enactments controlling general ones as formulated above is seriously incomplete. As the Ninth Circuit itself has previously recognized, a specific statute controls a general one only to the extent of irreconcilable conflict: "[P]rinciples of construction requiring the more recent and specific statute to prevail over the earlier and more general only apply when *there is an irreconcilable conflict* between statutes." *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 490 n.8 (9th Cir. 1984), *citing Watt v. Alaska*, 451 U.S. 259, 266 (1981). The court made absolutely no effort to demonstrate any such

irreconcilable conflict between ANILCA's Section 810(a) requirements and the tiered decision-making structure of OCSLAA.[6] Thus, the invocation of the aid to construction is not ripe.

Second, the invocation of the preference for later "specific" enactments over earlier more "general" ones amounts to the assertion of an implied repeal *pro tanto* of the allegedly conflicting portions of the earlier OCSLAA. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (statutes in irreconcilable conflict justify implied repeal). Such implied repeals are disfavored. *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 868 (1983). Rather, the reviewing court has a duty to harmonize the apparently conflicting statutes, and to give effect to each where possible to do so. *Watt v. Alaska, supra; accord Get Oil Out! Inc. v. Exxon Corporation*, 586 F.2d 726 (9th Cir. 1978): "It is our obligation to so construe federal statutes *so that they are consistent with each other*, as by this means *congressional intent can be given its fullest expression.*" *Id.* at 729. The Ninth Circuit has made no effort to harmonize ANILCA and OCSLAA and give effect to both, although its own precedent requires it to do so. Under these conditions of complete failure either to demonstrate irreconcilable conflict between ANILCA's Section 810(a)(1)-(3) procedures and OCSLAA's tiered decision-making structure, or to attempt to harmonize the above provisions of the acts, the Ninth

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[6] Indeed in *Village of False Pass*, the Ninth Circuit found OCSLAA and other detailed environmental schemes to be not merely *not irreconcilable*, but rather, to be positively "complementary." *See id.* at 609, 612.

Circuit's assertion of ANILCA's exception from the structure of OCSLAA is erroneous.

### C. Failure to Follow Secretary of the Interior v. California Results in Waste and Redundancy of Environmental Review

Finally, it should be noted that the Ninth Circuit's refusal to be bound by this Court's decision in *Secretary of the Interior v. California* in the context of ANILCA's Section 810(a) requirements has the further unfortunate result of rendering superfluous a specific subsequent portion of ANILCA. Section 810(b) of the Act provides:

> "If the Secretary is required to prepare an environmental impact statement pursuant to section 4332(2)(C) of Title 42, he shall provide the notice and hearing and include the findings required by subsection (a) of this section *as part of such environmental impact statement.*" *Id.* (emphasis added).

It is well established that NEPA applies at all the discrete stages of the tiered OCSLAA process. *Village of False Pass, supra.* As noted so many times above, staged application of regulatory review is implicit in the carefully crafted nature of OCS development decision making. However, a requirement that the Secretary conduct the full panoply of Section 810(a)(1)-(3) procedures at the lease sale stage would render the subsequent evaluations at the exploration and development/production stages redundant or superfluous. The command of Section 810(b) that makes perfect sense when review is performed as necessary and appropriate is rendered useless and nugatory by the Ninth Circuit's construction. A statutory interpretation that results in surplusage or absurdity is to be avoided. *Bell v. New Jersey,* 461 U.S. 773 (1983); *American Tobacco Co. v. Patterson,* 456 U.S. 63 (1982).

## III

## BY ASSERTING THAT UNDER THE PROVISIONS OF ANILCA CONGRESS HAS DECIDED TO FAVOR NATIVE ALASKANS' SUBSISTENCE NEEDS AND CULTURE OVER NATIONAL ENERGY NEEDS, THE NINTH CIRCUIT HAS USURPED THE FUNCTION OF POLICY FORMULATION THAT BELONGS SOLELY TO CONGRESS

As shown above in Section I.B., the Ninth Circuit in *Gambell II* refused to perform the scrutiny of statutory structure and purpose this Court required in *Weinberger v. Romero-Barcelo* for determining the extent of equitable discretion in statutory enforcement. Nevertheless, the court did engage in statutory analysis of a sort for the purpose of justifying the per se rule governing environmental/conservation act injunctions it had earlier announced. That "analysis," however, is based on a spurious reading of ANILCA that ignores legislative history and intrudes into the sphere of policy formulation reserved by the Constitution for Congress.

The Ninth Circuit attempted to bolster its newly announced per se rule by appealing to this Court's analysis in *TVA v. Hill, supra. See Gambell II,* 774 F.2d at 1426 n.2. Quoting this Court's words in *Weinberger v. Romero-Barcelo, supra,* in summary of its position in *Tennessee Valley Authority v. Hill* that "Congress, it appeared to us, had chosen the snail darter over the dam," *Gambell II,* 774 F.2d at 1426 n.2, *citing Romero-Barcelo,* 456 U.S. at 314, the Ninth Circuit then brought forward the startling analogy that "[i]t appears to us that in enacting section 810, *Congress has chosen the protection of subsistence life over oil exploration.* Thus, only the issuance of a preliminary injunction to compel compliance with the requirements of Section 810 can uphold Congressional intent." *Id.*

(emphasis added). The Ninth Circuit amplified its conclusion later on:

> "The public interest as expressed by Congress in the 1980 amendments to the Conservation Act [*i.e.*, ANILCA] requires that *the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must prevail over our possible energy needs.* Thus, the denial of a preliminary injunction was error because the court misapplied the law of the circuit concerning the 'unusual circumstances' exception and failed to honor *the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.*" *Gambell II*, 774 F.2d at 1428 (emphasis added).

No such public interest has been expressed by Congress, nor has Congress announced such a policy. Both the expression and announcement represent the bald policy assertions of the Ninth Circuit in direct contradiction of congressional intent.

The Ninth Circuit's position amounts to a *substantive* preference for subsistence uses under Section 810(a) of ANILCA. But by the Ninth Circuit's own estimation, Section 810(a) creates *procedural* duties and rights only. *Gambell II*, 774 F.2d at 1422. This distinction is borne out by the legislative history. Senate Report No. 413, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, sets out the text with commentary of the legislation that eventually became ANILCA. In discussing the amendments made by the Senate Committee on Energy and Natural Resources to the text of the House of Representatives' bill, H.R. No. 39, the report notes:

> "The second amendment [to Section 810] clarifies that the requirements of Section 810 are '*procedural*' in that until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes *the proposed action may proceed even though its effect may be adverse to subsistence uses.*" *Id.* at 5178 (emphasis added).

In *Gambell II* the court nowhere acknowledged this language nor incorporated it into its analysis of congressional policy underlying ANILCA.[7]

The federal courts are without authority to engage in this sort of substitutionary policy formulation. This Court has unmistakably indicated that it will not overturn the policy choices Congress has made:

> "In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent." *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, 215 (1962), *overruled on other grounds,* 398 U.S. 235 (1970).

Likewise, in this instance it is crystal clear that Congress has established *procedural* requirements under ANILCA that express no *substantive* preference for subsistence uses over necessary energy development.

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[7] This is especially surprising since the court quoted this very language in its earlier decision in *Gambell I* for this very principle, viz., the procedural nature of the Section 810(a) requirements with the real possibility of adverse impacts on subsistence uses upon completion of the required process. *See People of the Village of Gambell v. Clark,* 746 F.2d 572, 582 (9th Cir. 1984).

The rationale for such restraint is ably set out by the court in *McCoy v. Thorn*, 451 F. Supp. 351 (W.D. La. 1978):

> "It is for legislators, not judges, to decide important matters of public policy. It is for judges, independently and without fear of political reprisal, to interpret the law after the people, through the Constitution or through their elected representatives, have decided what public policy should be.
>
> "Once the judiciary embarks on a course of policy determination beyond the mere interpretation of law, it erodes the democratic process. Independent policy determination by a court violates the principle, embodied in the Constitution and proclaimed in the Declaration of Independence, that a political sovereign derives its power solely from the people." *Id.* at 352.

In attempting to justify its rule of per se injunctive relief upon a showing of violation of an environmental or conservation statute, the Ninth Circuit in *Gambell II* crossed the line into impermissible policy formulation in defiance of congressional intent. The Court should firmly direct it away from this error.

## CONCLUSION

The Ninth Circuit used the occasion of its decision in *Gambell II* to announce a per se rule granting injunctive relief upon a showing of probable violation of an environmental or conservation statute. Such a per se rule is in violation of this Court's express directions given in *Weinberger v. Romero-Barcelo, supra*, and should be over turned. The Ninth Circuit has erroneously interpreted ANILCA to create an implied repeal of OCSLAA, and has

usurped the policy formulating role of Congress. Amici respectfully request this Court to correct these errors.

DATED: July, 1986.

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# Supreme Court of the United States

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AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

DONALD P. HODEL SECRETARY
OF THE INTERIOR, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

**STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL, AND THE STATES OF ALASKA, DELAWARE, FLORIDA, HAWAII, KANSAS, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, AND WISCONSIN**

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## QUESTION PRESENTED

Does the Ninth Circuit's standard for issuance of an injunction for substantial violation of Alaska National Interest Lands Conservation Act section 810 properly reflect Congress's determination to protect subsistence uses and its creation of a single mechanism to provide for subsistence use protection?

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Nos. 85-1239 and 85-1406

In The

# Supreme Court of the United States

October Term, 1986

AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

DONALD P. HODEL SECRETARY
OF THE INTERIOR, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

**STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL, AND THE STATES OF ALASKA, DELAWARE, FLORIDA, HAWAII, KANSAS, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, AND WISCONSIN**

Amici respectfully submit this brief pursuant to Rule 36.4 of the Rules of the United States Supreme Court, in support of respondent, People of the Village of Gambell.

## INTERESTS OF AMICI

The states which have joined as amici in this brief share a deep and abiding concern for the continued diligent

enforcement of environmental statutes. Injunctive relief, as a remedy to statutory violation and as tool to maintain the status quo pending final judicial determination, forms a pivotal element of environmental enforcement, both in obtaining full statutory compliance and in achieving deterance.

Amici believe that this litigation concerns the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1982) (ANILCA), exclusively. While ANILCA itself, as the statutory protector of irreplaceable resources and the way of life of Alaska rural subsistence users, *see* 16 U.S.C. §§ 3110-3120, embodies elements of concern and interest to amici, amici are most concerned about petitioners' attempt to frame the issues before the Court as encompassing the availability of injunctive relief under "environmental statutes" generally. Amici benefit from laws such as ANILCA, the National Environmental Protect Act (NEPA), 42 U.S.C. §§ 4321-4361 (1982) and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), and are directly affected by the availability of injunctive relief for violations of those statutes.

Petitioners' misreading of ANILCA and their attempt to apply holdings specific to ANILCA section 810 to other environmental statutes directly implicate the interest of amici and form the basis for amici's participation. While amici believe that ANILCA sets the parameters of this case, the petitioners' attempt to expand the case beyond the confines of ANILCA provides the major impetus for the participation of amici.[1]

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1 The State of Alaska, which joins in this brief, of course, considers the issue of the proper injunction standard for an ANILCA section 810 violation of sufficient significance, standing alone, for its participation in this case.

## SUMMARY OF ARGUMENT

Upon determining that the Secretary of the Interior, as a matter of strong likelihood, substantially violated the Alaska National Interest Lands Conservation Act (ANILCA) section 810, the district court must decide the appropriate remedy. While courts exercise equitable discretion in forming a remedy, the violated statute both limits and defines the discretionary boundaries. The courts must order relief in light of the objectives of the statute, bearing in mind congressional purpose, policy, and mandate. The courts' equitable discretion applies only to the formulation of remedies; the courts have no discretion to deny a remedy altogether, thereby denying enforcement of a legislative act.

Congress has the power to completely control judicial equitable discretion, and it has the power to guide and limit the exercise of the courts' discretion through its statutory enactments. In determining the appropriate remedy for an ANILCA section 810 violation, the Court must look to ANILCA itself to discern congressional policy and the appropriate parameters of equitable discretion.

ANILCA presents a clear policy for protection of subsistence uses of Alaska rural residents. The statutory provisions apparently violated by the Secretary of the Interior form the sole mechanism for meaningful particiation by Alaska rural subsistence users in the subsistence management process. Failure to follow the ANILCA section 810 procedures skews the entire decision-making process and could seriously jeopardize subsistence uses. Congress's intent is clearly stated in ANILCA itself and in its legislative history: subsistence uses should be protected, and the mechanism codified by ANILCA section 810 represents the only manner congressionally determined as appropriate to

provide that protection. ANILCA section 810 severely limits equitable discretion as part of its protection of subsistence uses.

The Ninth Circuit's standard for issuance of an injunction for an ANILCA section 810 violation properly reflects the limits on discretion imposed by ANILCA. The Ninth Circuit standard imposes a presumption which the Secretary of the Interior must overcome to avoid the injunction. In this manner, the Ninth Circuit is sensitive to Congress's strong policy of protecting subsistence uses, while maintaining its discretion to deny injunctions in unusual cases.

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## ARGUMENT

### I. INTRODUCTION

In *People of the Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), the Court of Appeals affirmed the District Court's finding that the Villagers of Gambell established a strong likelihood of success on the merits—that the Secretary of the Interior substantially violated section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120 (1982). 774 F.2d at 1422. Having so determined, the court considered the best method of achieving compliance with ANILCA section 810 in light of Congress's expressly stated policy of protecting the subsistence uses and culture of Alaska rural residents. 16 U.S.C. § 3114 (1982).

Similarly, this Court should reach the question of the propriety of the issuance of an injunction in this case, and

the standard under which an injunction issues for ANILCA section 810 violations generally, only after it determines that the district court and the court of appeals properly found that the Villagers have a strong likelihood of success on the merits. Amici assume in the discussion that follows that the Secretary of the Interior substantially violated ANILCA section 810, and that the Court must decide the proper remedy.

## II. ONCE THE COURT DETERMINES THAT, AS A MATTER OF STRONG LIKELIHOOD, THE SECRETARY OF THE INTERIOR VIOLATED ANILCA SECTION 810, ONLY THE QUESTION OF HOW BEST TO ACHIEVE STATUTORY COMPLIANCE REMAINS

### A. The Court Must Look to ANILCA to Determine the Parameters of Its Equitable Discretion In Forming an Appropriate Remedy

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Court held that Congress preempted the application of federal common law by adopting a comprehensive regulatory scheme, specifically the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1376. 451 U.S. at 317. The Court found that the appropriate division of functions between the Judiciary and Congress applies to the courts' ability to form federal common law. 451 U.S. at 312; *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (federal courts are not courts of general common law). Thus, courts may not "'judicially decree [ ] what accords with "common sense and the public weal"' when Congress has addressed the problem." *City of Milwaukee*, 451 U.S. at 315, *quoting TVA v. Hill*, 437 U.S. 153, 195 (1978).

Congress has left no doubt that, with respect to the federal interest in the public lands of Alaska, ANILCA

occupies the field through a comprehensive regulatory scheme; with respect to the conservation units established by the Act

> "[ANILCA] provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and this Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby."

16 U.S.C. § 3101(d) (Congressional statement of purpose). ANILCA establishes a preference for subsistence use of fish and wildlife on federal lands. 16 U.S.C. §§ 3114, 3115. ANILCA defines the subsistence uses of rural Alaskans and it determines the protections afforded those uses. 16 U.S.C. §§ 3113, 3114, 3120. Judicial remedies for violation of the subsistence use protection embodied in ANILCA must be consistent with congressional purpose. *See City of Milwaukee,* 451 U.S. at 312 (federal rules in "areas of national concern" are made by Congress—not the courts).

Although *City of Milwaukee* concerns the preemption of federal common law by a comprehensive regulatory scheme, the Court's citation of *TVA v. Hill,* 437 U.S. 153, 194-95 (1978), strongly suggests that a similar analysis applies to the courts' equitable jurisdiction, albeit somewhat

more selectively. *See e.g., Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415-17 (1975) (statutes guide and limit equitable discretion). *City of Milwaukee* and ANILCA's statement of purpose make clear that ANILCA is the only relevant source of law and the only relevant source for determining the appropriate level of discretion (if any) applicable to formation of the remedy with respect to an ANILCA violation.

### B. Statutory Violation Requires Statutory Compliance, and Any Remedy Must Be Consistent With the Statute

Assuming that the lower courts properly determined that, in all likelihood, the Secretary of the Interior substantially violated ANILCA section 810, only the question of remedy remains. The Court cannot decide simply to ignore conduct violative of ANILCA section 810; some remedy, both consistent with and in furtherance of ANILCA must be implemented. *See United States v. American Tobacco Co.,* 221 U.S. 106 185 (1910) (discretion of courts bounded by "duty of giving complete and efficacious effect to the prohibition of the statute."); *see also Gilbertville Trucking Co., v. United States,* 371 U.S. 115, 130 (1962). Failure to remedy the statutory violation would defeat congressional mandate and reformulate courts as legislators. *See Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 738, 866 (1824) ("When [courts] are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course of the law. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for purpose of giving effect to the will of the Legislature; or, in other

words, to the will of the law.") Any "balancing" that occurs concerns the appropriateness of a particular remedy, not whether the violation should be remedied. *See Romero-Barcelo,* 456 U.S. at 320 (FWPCA permits the district court to order relief necessary to secure *prompt* compliance with the Act); *Hecht Co. v. Bowles,* 321 U.S. 321, 326 (1944) (because an injunction would have "no effect by way of insuring better compliance in the future" it was inappropriate).

Determination of the proper remedy for statutory violation depends on Congress's purposes underlying and defining the statute. *See, e.g., Albemarle,* 422 U.S. at 426; *Hecht,* 321 U.S. at 331 (the court exercises its power "in light of the large objectives of the Act"). ANILCA and other environmental statutes—particularly in light of the often sensitive nature of the environment itself as well as the decision-making process preceding projects affecting the environment—present cases in which courts must take special care in considering congressional intent in determining remedies for statutory violations. *See* discussion in §§ VI, VII infra.

## III. CONGRESS HAS THE AUTHORITY TO LIMIT JUDICIAL EXERCISE OF EQUITABLE DISCRETION

### A. The Violated Statute Forms the Limits of the Appropriate Remedy

Congress can, and does, limit judicial equitable discretion. *See, e.g., United States v. Rodgers,* 461 U.S. 677, 709 (1983); *Romero-Barcelo,* 456 U.S. at 320; *TVA v. Hill,* 437 U.S. at 194-95; *Albemarle,* 422 U.S. at 415-17; *Arizona v. California,* 373 U.S. 546, 565-66 (1963); *Hecht,* 321 U.S. at 329. In *TVA v. Hill,* 437 U.S. at 194-95, the Court found

that Congress can remove equitable jurisdiction from courts in its entirety:

> "Congress has spoken in the plainest of words. . . . Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."

Thus, even in the face of what the district court termed an "absurd result," *id.* at 196 (Powell, J. dissenting), the Court could not "preempt congressional action by judically decreeing" a "common sense result." *Id.* at 195. *TVA v. Hill* leaves no doubt that the exercise of congressional power limits judicial equitable remedies, and, at times, forecloses all discretion upon a finding of statutory violation.

In most instances, Congress does not foreclose all judicial equitable discretion. *E.g., Romero-Barcelo,* 456 U.S. at 313 (preclusion of all equitable discretion "not lightly assumed"). However, statutes define and limit the courts' power to formulate remedies. *See, e.g., id., Albemarle,* 422 U.S. at 415-17.

The courts' role in enforcing statutory compliance places the statutory scheme with its congressional purposes and goals along side the courts' equitable powers, with the statute defining and limiting equitable discretion. In fact, the issue of the proper standard by which to evaluate the propriety of injunctive relief in light of the probable statutory violation can usefully be framed as an attempt to determine the proper accomodation between congressional statutory mandate and judicial equitable discretion. *See Id.* The courts' balance of competing interests to determine the appropriate means of compliance with congres-

sional mandate, requires, in essence, a policy decision (albeit a *judicial* policy decision). This is particularly true in cases of violations of environmental statutes. *See* discussion § VI infra. Because the courts engage in balancing, they must have congressional mandate clearly in mind and their discretion must embody statutory dictates.

The Court's cases give guidance as to the proper accomodation of statutory mandate and equitable discretion. In *Albemarle*, 422 U.S. at 405, 415-417, for example, the Court, discussing equitable relief in Title VII cases, stated:

> [S]uch discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va 1807) (Marshall, C.J.). . . . A court must exercise this power "in light of the large objectives of the Act," *Hecht Co. v. Bowles*, 321 U.S. 321, 331, (1944). That the court's discretion is equitable in nature, *see Curtis v. Loether*, 415 U.S. 189, 197 (1974), hardly means that is is unfettered by meaningful standards or shielded from thorough appellate review. . . . It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility." *Holmber v. Armbrecht*, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to furnish transcedent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot." Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne v. States Marine Lines*, 398 U.S. 75, 405 (1970).

Similarly, in *United States v. Rodgers*, 461 U.S. 677, 708-09 (1983), the Court found that the federal codifica-

tion of forced judicial sales, 26 U.S.C. § 7403 (1982), allowed "limited equitable discretion" to consider the Government's interests and the interest of innocent third parties. Congress's amendment to the language of section 7403 from "shall decree a sale" to "may decree a sale" persuaded the Court that the statute allowed limited discretion. 461 U.S. at 705-09. *See also Arizona v. California,* 373 U.S. 546, 565-66 (1963) (where Congress has provided its own method for allocating water, courts cannot substitute their own version of equitable apportionment). In *Hecht,* 321 U.S. at 330-31, the court stated that "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action," and that discretion must be "exercised in light of the large objectives of the Act." The *Hecht* Court found that in that particular case, continuing statutory violation was unlikely and an injunction need not necessarily issue in order to assure compliance with the Act. Statutory language and congressional objective offer the greatest guidance to defining the limits of equitable discretion.

### B. The Court in Romero-Barcelo Recognized and Further Defined the Limits of Equitable Discretion

The Solicitor General and the oil companies view *Romero-Barcelo* as a statement of judicial equitable authority to balance statutory *enforcement* against "competing interests." *Romero-Barcelo* contemplates a balance only of remedies: "We read the FWPCA as permitting the exercise of a court's equitable discretion . . . to order re-

lief that will achieve *compliance* with Act." 456 U.S. at 318 (emphasis in original). The issue is how to enforce the statute, not whether to do so. Further, the *Romero-Barcelo* Court recognized that the FWPCA limited the courts' discretion in formulating remedies:

> "We do not read the FWPCA as foreclosing *completely* the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act."

456 U.S. at 320 (emphasis added).

The Court concluded that the FWPCA did not completely foreclose equitable discretion only after determining that injunction was not the only means of ensuring statutory compliance, that the congressional objective could be protected by other remedies, and that the district court's consideration of appropriate remedies neither ignored the statutory violation nor undercut the purpose and function of the FWPCA permit system. 456 U.S. at 314-15. Even in light of these conclusions, the Court remanded the case for further consideration of the propriety of the injunction denial. 456 U.S. at 320.

The present case involves a continuing violation of a statute that in no uncertain terms delineates the Secretary of the Interior's duties regarding evaluation of the subsistence uses of Alaska Natives. Following the guidance of *Romero-Barcelo*, determination of the limits of equitable discretion imposed by ANILCA section 810 depends on whether relief other than an injunction can ensure statutory compliance, whether congressional objectives can be

protected by other remedies, and whether other remedies will ignore or undercut the purposes and functions of ANILCA. The subject of the inquiry is ANILCA itself.

## IV. ANILCA SEVERELY LIMITS EQUITABLE DISCRETION

### A. ANILCA Unambiguously Requires the Secretary of the Interior to Act to Protect the Decision-making Process and the Subsistence Needs of Rural Alaskans

Section 810 of ANILCA, 16 U.S.C. § 3120, the subject of this litigation, states unequivocally the duties of the Secretary of the Interior:

> "In determining whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—
>
> (1) gives notice to appropriate [State and local agencies];
>
> (2) gives notice of, and holds a hearing in the vicinity of the area involved; and
>
> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity

> will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and, (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions."

ANILCA section 810, 16 U.S.C. § 3120(a). Subsection (a) of section 810 is entitled "Factors considered, requirements," and states that the Secretary "*shall evaluate,*" leaving no option for the Secretary to follow another procedure or fail to act (emphasis added). Similarly, the statute requires that for *any* land use that significantly restricts subsistence uses, including leases, the Secretary *shall* follow notice and hearing procedures. Subsection (b) requires that the Secretary *shall* provide notice and hearing as part of any environmental impact statement filed pursuant to 42 U.S.C. § 4332(2)(c) (NEPA), for proposed actions under section 810. Congress leaves no doubt that ANILCA, on its face, *requires* that the Secretary follow section 810 procedures *before* allowing leasing of restricted lands for non-subsistence purposes. *Cf. United States v. Rodgers,* 461 U.S. at 705-09 (where Congress substituted "may" for "shall" some judicial discretion can be inferred).

While the language of ANILCA section 810 is clear, Congress also included in Title VIII of ANILCA a Congressional Declaration of Findings, 16 U.S.C. § 3111; a Congressional Statement of Policy, 16 U.S.C. § 3112; and a statement of Preference for Subsistence Uses, 16 U.S.C. § 3114, all of which further reflect the importance of the protection of subsistence uses and Congress' intent strictly to enforce ANILCA: "It is . . . the policy of Congress that . . . utilization of the public lands in Alaska

is to cause the least adverse impact on rural residents who depend upon subsistence uses of the resources of such lands. . . ." 16 U.S.C. § 3112.

"[I]n order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 et seq.] and as a matter of equity, it is necessary for Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4). With respect to land use decisions, Congress chose to protect and provide for continued subsistence uses through mandatory notice and hearing procedures, to be implemented before the use of any public lands for other than subsistence purposes, including leasing.

In fulfilling its policy that "utilization of public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses . . .," 16 U.S.C. § 3112, Congress created the mandatory notice and hearing requirements of section 810, requiring the Secretary to analyze and make findings before acting in a manner adverse to subsistence uses. The policy of protection and the mandatory statutory procedure for implementation of the protection form a unit for preservation of subsistence uses.

Determination of appropriate non-subsistence uses of public lands depends entirely on the procedures of section 810. Congress created no other mechanism for consideration of reduction or elimination of subsistence uses. The

procedural mechanism embodies the substantive right. Congress manifested its interest in and concern for subsistence uses and implemented one mandatory system to allow consideration of competing uses. Only through enforcement of the statutory requirements as created can the policy and purpose of ANILCA be properly enforced. The language of the statute creates a legal duty to act in a prescribed manner, without alternative.

### B. The Legislative History of ANILCA Further Supports A Strict Reading of the Statute Limiting Remedies for Violation

Representative Udall was the primary author and sponsor of the subsistence provisions of ANILCA. The following statements of Representative Udall make it clear that Congress had every intention of protecting subsistence uses through the requirements of ANILCA:

> "[W]e promised that we would work to try to achieve legislation which would include a subsistence management process to insure meaningful participation by rural people in decisions of both the State and Federal governments which so effect their culture and their lives, and which would provide a mechanism to insure that both State and Federal governments discharge their responsibilities to protect subsistence resources and uses in an adequate and timely fashion."

125 Cong. Rec. 9904 (1979). The comments reflect ANILCA's substantive nature and goals:

> "[R]ural residents and especially Native people expressed concern that their use of fish, wildlife and other wild renewable resources for subsistence must be protected and permitted to continue. . . . It was in response to these concerns [that Title VIII of ANILCA was written]."

*Id.* Congress recognized high stakes in enacting the subsistence review procedures: "[Subsistence] is a way of life, a unique and endangered way of life that [Title VIII] fully protects. . . ." Id. at 9901. And further:

> "If for any reason . . . the fish stocks and wildlife populations which are the subject of Alaska Native subsistence uses are significantly reduced, either as the result of the degradations of habitat [or other activities], then the Alaska Native Culture as we know it will simply cease to exist."

126 Cong. Rec. 29278. (1980). ANILCA section 810 provides the only mechanisms for subsistence protection in land use decisions such as oil leasing:

> "[Title VIII] contain[s] management provisions which recognize the responsibility of the Federal government to protect the opportunity from generation to generation for the continuation of subsistence use . . . ."

*Id.*

Congress expressed an awareness of a grave threat to subsistence culture and believed that ANILCA protected rural Alaskans' needs. ANILCA is self-contained; Congress declared its intent to protect subsistence needs exactly in the manner prescribed by ANILCA.

## V. BECAUSE ANILCA MANDATES SPECIFIC PROCEDURES, THE SEPARATION OF POWERS DOCTRINE LIMITS EQUITABLE DISCRETION

Once Congress has legislated specific remedies for statutory violations, it, in essence, preempts judicial discretion under the separation of powers doctrine:

> "Our system of government is, after all, a tripartite one, with each Branch having certain defined func-

> tions delegated to it by the Constitution. While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies. mandate programs and projects, but to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them. . . ."

*TVA v. Hill,* 437 U.S. at 194. This is the case even where the result is "absurd." *Id.* at 196 (Powell dissenting); *see Wilderness Society v. Morton,* 479 F.2d 842 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973) ("it is an abiding function of the courts . . . to require the Executive to abide by the limitations prescribed by the Legislature"); *see also Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) at 866.

Congress has spoken with respect to subsistence uses: The protection of Alaska rural residents' way-of-life depends on federal action. ANILCA requires procedural integrity. Non-injunctive relief cannot protect the subsistence review process. Section 810 requires that a lease of land affecting subsistences uses be subject to section 810 procedures. The statute creates no option for non-compliance or partial compliance.

## VI. CONGRESSIONAL PURPOSE AND THE INTEGRITY OF THE SUBSISTENCE USE ANALYSIS AND HEARING PROCESS UNDER ANILCA CAN BE PROTECTED ONLY BY INJUNCTIVE RELIEF, EXCEPT IN UNUSUAL CIRCUMSTANCES

ANILCA section 810 is designed to influence and control the land use decision-making process from a very

early stage. It is a procedural device with substantative purposes. *See* 16 U.S.C. section 3120(d). As long as the Secretary complies with the statute, public lands under his control can be used as the Secretary sees fit. *Id.* But the statute operates properly—according to Congressional design—if, and only if, the Secretary "compl[ies] with the procedural requirements." 16 U.S.C. § 312(d). Failure of the Secretary to comply with the procedural requirements skews the decision-making process and defeats Congress's policy to evaluate and determine whether a project will "cause the least adverse impact on rural residents who depend upon subsistence uses." 16 U.S.C. § 3112(1). Failure to comply with ANILCA section 810 also defeats Congress's intent to "provide a mechanism to insure . . . protect[ion of] subsistence resources and uses in an adequate and timely fashion." 125 Cong. Rec. 9904 (1979) (comments of Rep. Udall).

Obviously, if the Secretary implements a project affecting subsistence uses without following ANILCA procedures, part of the harm intended to be prevented is suffered and the integrity of the decision-making process destroyed. *See, e.g., Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (harm under NEPA occurs when informed environmental consideration is bypassed). Further, the specific function of ANILCA section 810—the protection of subsistence uses—is jeopardized because the decision-maker cannot make informed findings and, ultimately, an informed decision. The Secretary has not heard from the people most knowledgable about subsistence uses. Thus, the statute, the mechanism, the decision-making process, and potentially subsistence uses themselves have been compromised.

In light of the foregoing, the court must form a remedy for the Secretary's failure. The potential harm is catastrophic. 126 Cong. Rec. 29278 (1980) (comments of Rep. Udall) (if subsistence uses are not protected, "Alaska Native Culture as we know it will simply cease to exist"). In light of the presumptions in favor of subsistence uses, and Congress's expressed concern, it is difficult to imagine a situation in which any hardship could outweigh the need to enforce the mechanism protecting subsistence uses. In very unusual circumstances, the delay caused by evaluation of the effect on subsistence uses of some federal action could adversely affect subsistence uses. *Cf. Alpine Lakes Protection Society v. Schlapfer,* 518 F.2d 1089 (9th Cir. 1975) (delay for EIS under NEPA could cause insect infestation and forest loss).

If the court allows a project to continue without the proper subsistence use evaluation, the decision-making process is compromised and the threat to subsistence use becomes, potentially, much more immediate. The further along a project progresses, the greater the stake, both financially and institutionally. *See Massachusetts v. Watt,* 716 F.2d at 953.

The injunction is an extension of congressional intent in the section 810 situation. Nothing else will ensure statutory compliance. Unlike the situation in *Romero-Barcelo,* 456 U.S. at 314, where the Navy could obtain a permit under the FWPCA without distorting the decision-making process, here failure to follow ANILCA procedures precludes future compliance with the mechanism of section 810. Con-

gress has spoken emphatically in favor of subsistence uses and, in doing so, has severely limited remedial relief.[2]

## VII. THE NINTH CIRCUIT STANDARD APPLIED IN THIS CASE REFLECTS CONGRESSIONAL LIMITS ON EQUITABLE RELIEF WHILE ALLOWING A SIGNIFICANT AND STATUTORILY APPROPRIATE LEVEL OF DISCRETION

In *People of the Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), the Ninth Circuit first affirmed the district court's finding that the Villagers showed a strong likelihood of success on the merits. *Id.* at 1422. The court then balanced the irreparable harms in determining the propriety of injunctive relief to maintain the status quo in light of the probable statutory violation. *Id.* at 1422-26. In doing so, the court applied a presumption to the equation which placed the burden on the probable statute-violator to show the inappropriateness of an injunction. *Id.* at 1422-23. The Secretary in *Gambell* failed to meet his burden and the Ninth Circuit issued the injunction. *Id.* at 1426.

The burden applied in *Gambell* is a heavy one: the probable statute-violator must show rare or unusual circumstances to convince the court that the statutory viola-

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2 The Solicitor General agrues that compliance with ANILCA could occur at the later "development and production" stage without prejudice because the "lease" stage is not a threat to subsistence uses. Federal Petitioner's Brief at 14. Congress, however, determined that a lease of land requires that the ANILCA section 810 procedure be followed. 16 U.S.C. § 3120. Only if the Secretary considers subsistence prior to leasing can he properly consider "the availability of other lands for the purposes sought to be achieved" with subsistence uses in mind —as required by section 810. Congress has specified use of the procedure at the time of the lease. The Secretary has no option to do the procedure at some other time.

tion should be allowed to continue unremedied and that an injunction should not issue. The burden applied by the Ninth Circuit appropriately accounts for the emphatic congressional policy of protecting subsistence uses and the operation of the sole—and exclusive—statutory method for determining priorities where an action affects subsistence uses. At the same time, the Ninth Circuit rule does not foreclose discretion in the rare or unusual case in which congressional purpose and intent would be defeated by the grant of an injunction.

First, the Ninth Circuit standard applied in *Gambell* is not a "per se rule"—it does not *require* that an injunction automatically issue upon a showing of statutory violation or probable statutory violation. In three published NEPA cases, the Ninth Circuit has applied the same injunction standard applied in *Gambell* under ANILCA and determined that, on balance, the unusual circumstances outweigh the presumption in favor of injunctive relief.

In *American Motorcyclist v. Watt*, 714 F.2d 926, 966 (9th Cir. 1983), the court determined that "public concerns other than the failure to comply with NEPA must be weighed in determining whether to grant an injunction." The court in *American Motorcyclist*, citing *Romero-Barcelo*, denied the injunction for fear of resultant permanent damage to fragile desert resources after determining that the district court properly engaged in the "required weighing" and consideration of the public interest. *Id.* at 966-67. Similarly, in *Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975), the Ninth Circuit denied a NEPA injunction because it would lead to timber damage and insect infestation, a harm which the court found outweighed the possible reduction of the area's wilderness characteristics. In *Forelaws on Board v. Johnson*, 743 F.2d

677, 688 (9th Cir. 1984), the court denied an injunction as inappropriate in light of disruption of long-term contracts entered into pursuant to another federal act that mandated their implementation with "a certain amount of urgency." *See also Steamboaters v. FERC*, 777 F.2d 1384, 1385-86 (9th Cir. 1985) (presumption of harm from NEPA violatoon outweighed "public interest in promoting small hydropower projects"); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) (presumption outweighed defendant's showing). Obviously, the Ninth Circuit standard applied in the *Gambell* case to a violation of ANILCA section 810 is not a "per se" injunction rule.

The Ninth Circuit standard allows the statute violator or probable violator to overcome the injunction presumption. Appropriately, the burden on the violator is high. The burden reflects ANILCA's protection of subsistence uses and Congress's choice of the decision-making process while allowing the courts to exercise their historical equitable discretion to achieve compliance with the purposes of the Act as well as the letter of the statute. *E.g.*, *Romero-Barcelo*, 456 U.S. at 314.

Applying the Ninth Circuit standard to factual situations in *Hecht* and *Romero-Barcelo* would allow the court to reach the appropriate results. In *Hecht*, 321 U.S. at 326, the Court determined that an injunction would not further compliance. *See* Plater, Statutory Violations and Equitable Discretion, 70 Cal.L.Rev. 524, 546-53 (1982). *Hecht* involved a remedy only for past violations. Such a situation, particularly one involving a violation of ANILCA or NEPA, *see* discussion in section VI supra, would undoubtedly rise to the level of unusual circumstances. It is difficult to imagine an ANILCA section 810 violation that had only retrospec-

tive effect, but in the face of such a situation, the Ninth Circuit's standard certainly would account for it in its balance.

In *Romero-Barcelo,* the Court, reviewing the navy's release of ordnance from aircraft into navigable waters as the basis for an injunction under the FWPCA, 33 U.S.C. §§ 1251-1376 (1982), pointed to the district court's determination that (1) the Navy's control of the release area probably constituted a positive factor in the area's ecology, and (2) because of the Navy's important training functions, injunctive relief would cause grievous harms to the welfare of the Navy and the nation. 456 U.S. at 310 & n. 4. The Court also determined that the Navy's action "neither ignored the statutory violation nor undercut the purpose and function of the permit system." *Id.* at 315. The Ninth Circuit's formulation envisions consideration of exactly such factors. *See Forelaws on Board,* 743 F.2d at 966, *Alpine Lakes Protection Society,* 518 F.2d at 1090; *see also Steamboater v. FERC,* 777 F.2d at 1385-86. Similar findings under ANILCA are very unlikely, but, again, would present unusual circumstances for balance under the Ninth Circuit standard.

Congress severely limited judicial equitable discretion by enacting the strict requirements of ANILCA section 810 and instituted protection of the subsistence needs and uses of rural Alaskans through a well-defined mechanism. The Ninth Circuit standard applied in *Gambell* is sensitive both to the congressional mandate and legislated presumption and to the possibility of unusual circumstances which require discretion and nuance in formulating remedies to achieve compliance in an equitable manner. As such, the Ninth Circuit standard applied in *Gambell* consistently fol-

lows the teachings of *Romero-Barcelo, TVA v. Hill,* and *Hecht.*

## VIII. CONSIDERATION OF THE APPROPRIATE INJUNCTION STANDARD IN NEPA CASES IS IRRELEVANT TO THIS LITIGATION

The Solicitor General and the oil companies attack the Ninth Circuit's use of its injunction standard in "environmental" cases. ANILCA section 810, not "environmental statutes," is the subject of this litigation. Because Congress through its legislative process determines the extent of judicial equitable discretion, see e.g., *Hecht,* 321 U.S. at 331, only ANILCA gives guidance with respect to the appropriate standard under which injunctive relief should be granted. The standard applicable for violations of other environmental statutes cases depends on the wording of those statutes and a full review of the statute's legislative history—an inquiry inappropriate in this ANILCA section 810 case.

The Solicitor General's brief best illustrates the need for a statute-specific inquiry. While the Solicitor frames the question on certiorari as whether an injunction should issue for a likely violation of "an environmental statute," he is forced repeatedly to return to the text of ANILCA to argue the propriety of the injunction in this case. *E.g.* Federal Petitioners Brief at 21-22, 22, 23, 24, 25. The Solicitor's analysis of ANILCA gives no guidance for injunctive issuance standards under other statutes, other than to underline the need to review each statute separately.

Only ANILCA is relevant to the specific consideration of hardship factors in this case. The Ninth Circuit properly applied a presumption in favor of injunctive relief

for an ANILCA section 810 violation that reflects congressional intent while allowing sufficient discretion to deal appropriately with unforseeable cases.

Congress requires that Alaskan rural residents receive the opportunity to enter the decision-making process from the beginning. Congress determined the sole process by which Alaska rural residents' interests can be heard and considered. When the Secretary fails to follow the mandated procedures, decision-making is distorted and the natives' interests lose protection. The Secretary can decide appropriate land uses only according to the legal mechanism. Injunctive relief protects the intergrity of the process.

## IX. CONCLUSION

For the foregoing reasons, amici submit that the decision of the Ninth Circuit should be affirmed.

Dated: September 30, 1986

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# In the Supreme Court of the United States

**OCTOBER TERM, 1986**

DONALD P. HODEL, SECRETARY OF THE INTERIOR; and THE UNITED STATES DEPARTMENT OF THE INTERIOR, and AMOCO PRODUCTION COMPANY, et al.,

*Petitioners,*

vs.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

*Respondents.*

## AMICUS BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, WILDERNESS SOCIETY, ENVIRONMENTAL POLICY INSTITUTE, TRUSTEES FOR ALASKA, NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES, and OREGON NATURAL RESOURCES COUNCIL

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## ISSUE PRESENTED

Did the Court of Appeals err by ordering that the Department of Interior be enjoined from proceeding with a lease sale in violation of a nondiscretionary duty imposed by Congress in section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a)?

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## STATEMENT OF INTEREST OF AMICI CURIAE*

Amici Curiae are non-profit, public interest organizations whose purpose in part is to monitor the activities of federal agencies for compliance with environmental laws. Amici regularly seek redress in federal courts for agency violations of these laws. Injunctive relief is the principal remedy sought in such cases, and Amici are therefore vitally interested in this Court's rules of decision for granting or denying injunctive relief in cases involving statutory volations by federal agencies.

## SUMMARY OF ARGUMENT

Petitioner Hodel in this case failed to comply with the nondiscretionary procedural obligations of section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 1320(a). Under section 810(a) Hodel must evaluate the impacts of oil exploration and development on subsistence uses of public lands prior to leasing those lands. Petitioner Hodel failed to comply with this nondiscretionary duty.

This Court has long recognized Congress "may intervene and guide or control the exercise of the courts' discretion," provided Congress does so "in so many words, or by a necessary and inescapable inference. . . ." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) *quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). When Congress imposes nondiscretionary duties on federal

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*All parties have consented in writing to the participation of these *amici* pursuant to Rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of Respondents Village of Gambell, *et al.* This brief addresses only the propriety of the injunctive relief granted by the Court of Appeals in this case.

agencies Congress "by necessary inference" restricts the discretion of courts presented with violations of those duties. An agency's violation of a nondiscretionary duty constitutes irreparable injury which must be enjoined unless to do so would create a result contrary to the statute imposing the duty.

The Court of Appeals examined the language, purpose, and structure of section 810(a) of ANILCA to determine the appropriateness of injunctive relief in this case. Section 810(a) of ANILCA imposes a nondiscretionary duty upon the Secretary of the Interior to evaluate the impacts of oil exploration and development on subsistence uses of public lands prior to leasing. That duty was not fulfilled in this case. The court therefore properly remanded the case to the district court because the district court failed to account for the irreparable injury flowing from the violation of section 810(a).

The nondiscretionary duty imposed by section 810(a) of ANILCA is analogous to the duty imposed on federal agencies by section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), this Court concluded that it was compelled to enjoin violations of section 7 because injunctions were the only way to ensure compliance. In the circumstances of this case, injunctive relief is also the only method of insuring compliance with section 810(a) of ANILCA.

*Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), upon which petitioners rely, supports the Court of Appeals' decision in this case. *Weinberger* recognized that courts' equitable discretion may be controlled by Congress, and that close scrutiny of the purpose and structure of applicable statutes is necessary to determine the degree to which Congress has restricted that discretion. The

Court in *Weinberger* concluded that courts may deny injunctive relief for violations of the permit requirements of the Clean Water Act, 33 U.S.C. § 1342, because (1) there are alternative ways to enforce the Act, (2) the permit process is a means to an end and the lack of a permit is not *per se* inconsistent with the Act's substantive goals, and (3) the exercise of equitable discretion was consistent with the "phased-compliance" scheme of the Act. None of these features is present in section 810(a) of ANILCA.

The constitutional doctrines of separation of powers and checks and balances also support the Court of Appeals' conclusion that an injunction is required in this case. In *Weinberger*, section 402 of the Clean Water Act regulated the federal defendant as it would have regulated a private sector polluter. In contrast section 810(a) of ANILCA is directed exclusively at federal agencies and is intended to guide and restrict their exercise of delegated power. It is the Court's role to enforce Congress' limitations on delegated power so long as those delegations are constitutional.

This Court has upheld delegations of power to agencies against separation of powers challenges in part because such delegations have been accompanied by provisions that guide the exercise of that power. It would be anomalous for the Court, having previously found that Congress is constitutionally compelled to provide guidance for the exercise of delegated power, to conclude that courts may refuse to enforce such guidance without themselves violating separation of powers principles.

If the Court fails to enjoin defendant's violation of its nondiscretionary duty under section 810(a), defendant will accrue power not delegated by Congress, and Congressional

power to check the authority of Executive branch agencies will be diluted. The Court will have neglected its own constitutional responsibility to enforce the checks placed by Congress on delegated powers, and will have facilitated the unauthorized exercise of power by a coordinate branch of the federal government.

## I

## THE COURT OF APPEALS' OPINION IN THIS CASE IS CONSISTENT WITH THE PURPOSES OF § 810(a) OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)

The Court of Appeals in this case found that "[a]n injunction is the appropriate remedy for a substantive [sic] procedural violation of an environmental statute." *Village of Gambell v. Hodel*, 774 F.2d 1414, 1422 (9th Cir. 1986).[1] The court recognized that injunctive relief might not be appropriate in the unusual case where such relief would contravene the purposes of a statute, but concluded that in this case the defendant's violation of the nondiscretionary duty imposed by section 810(a) of ANILCA, must be enjoined because it violated "clearly expressed Congressional intent. . . ."[2] 774 F.2d at 1426. The court

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1. The word "substantive" should be "substantial," as it is in the opinion the court cites as the source of the rule. *See Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

2. When injunctive relief would create a result inconsistent with the purposes of a statute, a court's refusal to issue an injunction is consistent with its constitutional obligation to see that Congressional intent is carried out. *See e.g., American Motorcycle Association v. Watt*, 714 F.2d 962 (9th Cir. 1983) (injunction against enforcement of ordinance would allow race to proceed and cause harm to the environment); *Alpine Lakes Pro-*

(Continued on following page)

properly avoided speculation about whether compliance with section 810(a)'s procedures would have produced a particular result, and instead found that: " 'Irreparable damage is presumed when an agency fails to [follow procedures required by law].' " 774 F.2d at 1423 (*quoting Save Our ecoSystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). Since the district court had failed to account for the fact that an agency's violation of a nondiscretionary procedural obligation may itself cause irreparable injury to plaintiffs by undermining the decision-making process and the Constitution's distribution of federal power, the court of appeals remanded for entry of a preliminary injunction.[3]

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), this Court found that Congress, through the "purpose and language" of an Act, "may intervene and guide or control the exercise of the courts' discretion. . . ." An analysis of section 810(a) of ANILCA reveals that Congress did not intend to allow any exceptions to the mandatory requirements of the section, and therefore necessarily restricted the equitable discretion of courts presented with a violation of the section.

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Footnote continued—

*tection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975) (injunction against timber harvesting of infected trees would result in more trees being infected—a result inconsistent with environmental protection purposes of NEPA).

3. This case involves a preliminary injunction and technically no final determination on the merits has been reached. But the Court of Appeals' decision on the likelihood of success is unequivocal; the defendant has violated the statute as interpreted by the Court of Appeals. Petitioner Hodel candidly admits that the Court of Appeals' decision in this case is final (brief of Hodel at 25 n.14) and in fact has been given precedential effect in *Tribal Village of Akutan v. Hodel*, 788 F.2d 1567 (9th Cir. 1986). For purposes of determining appropriate relief, therefore, the case should be viewed as having been decided on the merits.

### A. Section 810(a) Imposes A Nondiscretionary Duty Analogous To That Imposed By Section 7 Of The Endangered Species Act

In concluding that an injunction was necessary based on the facts in the instant case, the court of appeals properly examined the purposes and structure of section 810(a) of ANILCA. Section 810(a) imposes a nondiscretionary duty upon the Secretary of the Interior to evaluate the impacts of oil exploration and development on subsistence uses of the public lands prior to leasing. It provides in relevant part:

> In determining whether to . . . lease . . . public lands under any provision of law authorizing such actions,[4] the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

If the relevant agency finds that a proposed lease may affect subsistence uses, the agency cannot proceed until the head of the agency:

> (1) gives notice to the appropriate State agency and the appropriate local committee and regional councils established pursuant to section 3115 of this title;
>
> (2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

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4. The Secretary's authority to conduct the lease sales at issue in the instant case was delegated by Congress in the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356.

> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

16 U.S.C. § 1320(a).

The purpose of section 810(a) is to guide the exercise of previously delegated power. Congress intended in section 810(a) to insure that agencies fully consider subsistence needs prior to leasing decisions. The nondiscretionary duty imposed by section 810(a) is analogous to the nondiscretionary duty imposed on federal agencies by section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and addressed in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Here, as with section 7 of the ESA, section 810(a) of ANILCA imposes an absolute duty: to evaluate impacts on subsistence uses, and to provide notice, hearings, and findings if significant impacts may occur. As this Court noted in *Weinberger*, the ESA "contains a flat ban on the destruction of critical habitats." 456 U.S. at 314. Once it was determined that completion of the Tellico dam would destroy critical habitat, the Court had no difficulty in concluding that "only an injunction would fulfill the objectives of the Act." *Id.* *See also Japan Whaling Assoc. v. American Cetacean Society*, 54 U.S.L.W. 4929, 4932 (June, 1986) ("The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in

question, if the intent of Congress is clear, that is the end of the matter."). The inference of Congressional intent to guide the exercise of judicial discretion is as necessary here as it was in *TVA v. Hill*. The court of appeals found that the appropriate way to vindicate the objectives of section 810(a) in this case is to enjoin the agency from proceeding until it has completed its section 810(a) analysis.

### B. The Procedural Nature Of The Harm In This Case Supports The Imposition Of An Injunction

Hodel attempts to distinguish *TVA v. Hill* by arguing that "[b]y its very nature, a procedural requirement is ancillary to the substantive policy objectives of the statutes and . . . injunctive relief should [therefore] normally turn on the particular circumstances of the case." Brief of Hodel at 22. Hodel thus asks that courts be allowed to predict whether the procedural requirements that Congress imposed absolutely will in fact further the "substantive goals" of a statute in particular cases. Even if such predictions could be made, however, courts must respect Congress' choice of procedures. Procedures carry intrinsic value, and the constitutional implications of judicial second-guessing of those values are significant.[5] As the First Circuit stated with regard to another procedural statute:

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5. "When Congress has prohibited certain conduct, law-abiding citizens presumably refrain from that conduct voluntarily. The defendant in an injunction proceeding who asks the court to balance the remedies in [its] favor is, in effect, asking the court to approve of [its] decision not to comply with the duties that law-abiding citizens comply with voluntarily. Thus, the court is being asked to voice its approval of lawless conduct." Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 16 Land Use and Environment L. Rev. 317, 339-40

(Continued on following page)

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make governmental officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. NEPA in this sense differs from substantive environmental statutes, such as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. The Federal Water Pollution Control Act focuses upon the "integrity of the Nation's Waters, not the permit process," *Weinberger v. Romero-Barcelo,* 456 U.S. at 314. NEPA does the converse. Moreover, to set aside the agency's action at a later date will not necessarily undo harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up.

*Massachusetts v. Watt,* 716 F.2d 946, 952 (1st Cir. 1983).

Hodel suggests that because the Senate report on ANILCA states that a proposed action may proceed after

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Footnote continued—

(1985). It is particularly inappropriate to approve of the lawless conduct when the violator is a federal agency. *See e.g.,* Executive Order No. 11514 (federal agencies are to "provide leadership in protecting and enhancing the quality of the Nation's environment . . .").

a section 810 evaluation, even though its effects are adverse to subsistence uses, Congress could not have intended that section 810(a)'s procedures always precede decision-making. Brief of Hodel at 23, n.13. But the fact that Congress chose not to dictate substantive results does not suggest that Congress would acquiesce in *post hoc*, formalistic procedural compliance. Quite the opposite. To the extent Congress has relinquished control over substantive outcomes, the need for strict compliance with the procedural safeguards accompanying the delegation of power is heightened. *See* part II of this brief, *infra*.

### C. Section 810(a) Of ANILCA Is Not Analogous To Section 402 Of The Clean Water Act

In *Weinberger v. Romero-Barcelo*, this Court concluded that federal courts are not compelled to issue injunctions against federal agencies who violate the permit requirements of section 402 of the Clean Water Act, 33 U.S.C. § 1342. 456 U.S. at 320. In concluding that Congress had not intended in section 402 to limit the equitable discretion of courts, the Court stressed three factors—none of those three factors is present in the instant case.

First, the Court found that injunctions were not the only method of enforcing the permit requirements of section 402. 456 U.S. at 314. In addition to providing for injunctive relief, the Act provided for fines and penalties to be imposed as a means of achieving the goals of the Act. *Id.* In contrast, ANILCA provides no system of fines or penalties to impose upon federal agencies who violate the nondiscretionary duty imposed by section 810(a).[6] Injunctive relief is the only means of ensuring compliance.

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6. The Clean Water Act's federal facilities provisions, 33 U.S.C. § 1323, subject federal agencies to the same regulatory

(Continued on following page)

Second, the Court found that the purpose of the Clean Water Act was to insure clean water for the nation, and the permit process was simply a means of achieving that goal. 456 U.S. at 314. Since the particular discharge at issue apparently did not pollute the water (456 U.S. at 315), and since the lower court had ordered the federal defendant to obtain a permit (*id.*), the Court found that the lower court's denial of injunctive relief was not contrary to the purposes of the Act.

In the instant case the purpose of section 810(a) of ANILCA is to require the Secretary, in exercising delegated powers, to evaluate the impacts of oil exploration and development on subsistence uses of the public lands and provide notices, hearings, and findings *prior to* allowing leasing to occur. The Secretary cannot comply with section 810(a) once a lease has been completed. The legislative history of section 810(a) confirms its plain language. Congress intended that "until the requirements of . . . section [810] have been satisfied the proposed action *may not* proceed." S. Rep. 96-413, at 234 (emphasis added). Pre-decision consideration is the *raison d'etre* of section 810(a), and allowing *post hoc* compliance, or no compliance, is unquestionably contrary to the purposes of section 810.

Finally, this Court in *Weinberger* found that Congress did not envision that all pollution would be halted immediately, but rather envisioned a period of "phased compliance," in which the economic and environmental impacts of reducing pollution could be weighed on a case-by-case

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**Footnote continued—**

requirements as private citizens, essentially treating agencies as citizens when they pollute water. In contrast, section 810(a) is directed at agencies *qua* agencies, and reflects Congress' determination to control how those agencies exercise delegated powers.

basis. 456 U.S. at 316-17. The exercise of judicial equitable discretion was consistent with the phased compliance scheme of the Clean Water Act. No equivalent phased compliance scheme exists under ANILCA. Section 810(a) makes clear that compliance must occur prior to making any decision to lease.

Amoco argues that a number of lower court opinions apply *Weinberger* "broadly," and urges this Court to follow suit. Brief of Amoco at 44-45. But a close examination of the opinions cited by Amoco reveals that, while those courts cited *Weinberger* for the proposition that courts retain broad discretion to excuse statutory violations, they have *applied* that discretion to withhold injunctive relief only in cases where agency compliance was likely to occur in the absence of an injunction.[7]

## II

## REFUSING TO ENFORCE A NONDISCRETIONARY DUTY IS CONTRARY TO THE DOCTRINES OF SEPARATION OF POWERS AND CHECKS AND BALANCES

There are significant constitutional aspects to the injury created by agency violations of nondiscretionary procedural obligations. When Congress imposes on Executive branch agencies a nondiscretionary duty to follow specified procedures while exercising delegated powers,

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7. *See e.g., Alaska v. Andrus*, 580 F.2d 465, 486 (D.C. Cir.) *vacated in part on other grounds sub nom.; Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (injunction not necessary to preserve opportunity to choose among alternatives). *See generally* Z. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982) (reviewing cases in which courts have declined to issue injunctions against statutory violations because compliance would occur without the injunction).

courts have a constitutional obligation to enforce such duties. Agency violations of nondiscretionary duties involve clear derelictions of the Executive branch's obligations to execute the laws of Congress. In enforcing such duties the Court must be sensitive to its constitutional role, as well as the constitutional roles of the Executive and Legislative branches. The Court exceeds the bounds of its judicial role if it second-guesses the propriety of applying Congressional controls on delegated agency powers. This Court has concluded that broad delegations of power to Executive branch agencies are constitutional only *if* they contain appropriate standards or controls for the exercise of such power.[8] For courts to decline to enforce such controls raises the very constitutional concerns the Court has expressed about the initial delegations. When a federal agency is the defendant in a case involving violations of a nondiscretionary duty, a refusal to enjoin the violation is an abdication of the Court's role in the constitutional system of checks and balances and allows irreparable injury to the Constitution's allocation of federal power.

### A. Federal Courts Must Enforce Procedural Safeguards Imposed By Congress To Maintain The Separation Of Powers

This Court has recently emphasized the importance of Congressional control over the exercise of delegated powers in maintaining the separation of powers envi-

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8. *See e.g., American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 543 (Rehnquist, J., dissenting); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (stressing the importance of adequate controls on the exercise of delegated powers); *Yakus v. United States*, 321 U.S. 414 (1944) (delegated price control authority constitutional because accompanied by sufficiently clear standards established by Congress).

sioned by the Constitution. *See Industrial Union Dept., AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 646 (1980) ("sweeping delegation[s] of legislative power" violate separation of powers principles). When Congress imposes nondiscretionary procedural duties, judicial enforcement of controls on delegated power is particularly important. Congress in such statutes expresses its deepest concern for the proper exercise of delegated powers, and includes the word "shall" rather than "may" because it means to brook no exceptions. *See e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1970) (agency did not have discretion to ignore Congressional direction that agencies "shall" not approve any program affecting parklands unless specific criteria are present—Court enjoined action pending compliance with procedures). Nondiscretionary language is important because it plainly marks the division between legislative and executive power. If courts erase that line by refusing to enforce nondiscretionary duties, they contribute to an irreparable injury with constitutional implications—an erosion of the basic principle of separation of federal powers.

### B. The Constitution's System Of Checks And Balances Requires The Judiciary To Insure Executive Compliance With Legislative Directives

Judicial decisions not to enforce agency nondiscretionary duties imposed by Congress also violate the constitutional principle of checks and balances. When courts elect not to enjoin statutory violations of *regulatory* statutes (which are essentially the same whether the regulated entity is a federal facility or a private party), that raises concerns about the separation of powers and whether the *court* is fulfilling its law-enforcing role. When courts are presented with agency violations of nondiscretionary

duties, that triggers the Court's additional obligation to check the unauthorized exercise of power by a coordinate branch of the federal government. The drafters of the Constitution determined that: "[The] three branches [of the federal government] should be rendered interdependent by giving each other a 'partial agency, or control,' over the other branches, securing in that way an equilibrium of governmental powers. This achieved a novel mixture of the doctrine of separation of powers with the doctrine of checks and balances." Panagopoulos, *Essays on the History and Meaning of Checks and Balances,* 174-75 (Univ. Press of America 1985). An important aspect of the Court's role in checking the power of its sister branches is its review of Executive branch actions to insure that they comply with constitutionally imposed legislative commands. "The courts have . . . traditionally exercised a reviewing function to ensure executive compliance with applicable public law, policing executive officers' obedience to legislative commands and providing a further set of internal checks on governmental power used against the citizenry." Breyer and Stewart, *Administrative Law and Regulatory Policy* 42 (Little, Brown, and Co. 1985). When agencies refuse to comply with nondiscretionary obligations imposed by Congress, courts are the only practical forum for remedying such violations. If the courts do not restrain such abuses, they will go unchecked.

While the tension between the courts' traditional balancing of equities and their role in the constitutional system of checks and balances may (as in *Weinberger, supra*) be resolved in favor of the courts' equity power when the exercise of judicial discretion is consistent with a statutory scheme, the courts' role as a check on Executive power must predominate when the courts are faced with a viola-

tion by an Executive branch agency of a nondiscretionary duty imposed by Congress and intended to guide the exercise of delegated power.

## III

## PETITIONERS HAVE NOT DEMONSTRATED THAT THE COURT OF APPEALS ABUSED ITS DISCRETION BY REQUIRING AN INJUNCTION IN THIS CASE

### A. Petitioners Have Not Accurately Analyzed The Language And Purpose Of Section 810(a)

Petitioners argue that the court of appeals' opinion in this case is contrary to this Court's opinion in *Weinberger*. Brief of Hodel at 17; brief of Amoco at 44-46. Petitioner Amoco, however, misapplies *Weinberger* by simply iterating the general rule that Congressional intent to restrict equitable discretion will not lightly be implied. Amoco does not, as *Weinberger* requires, analyze section 810(a) to determine whether the specific language and purpose of that provision limits the courts' equitable discretion.

Petitioner Hodel argues that there is no "clear indication" that Congress intended through section 810 to limit the traditional equitable discretion of the courts, because the language of section 810 "does not address the distinct issue whether a district court must award certain relief. . . ." Brief of Hodel at 22. But Congress need not directly address the issue of judicial discretion in order to limit the courts' exercise of equitable powers. As this Court found in *TVA v. Hill, supra,* the nondiscretionary language of an Act may limit the courts' discretion, even though the statute does not expressly address the issue of equitable discretion. The Court drew the "necessary inference" from the language and purpose of the ESA that

Congress intended to limit the courts' equitable discretion. 437 U.S. at 194. The same inference is compelled by the nondiscretionary language of section 810; Congress did not intend to brook exceptions—administrative *or* judicial.

### B. Section 810(a) Compliance May Not Occur Subsequent To Leasing

Hodel argues that an injunction is not necessary in this case because, according to Hodel, compliance with the procedural requirements of section 810 may occur subsequent to leasing but prior to development and production.[9] Brief of Hodel at 24. There are three problems with Hodel's argument.

First, it ignores the plain language of § 810, which requires that evaluation of impacts on subsistence uses take place "[i]*n* determining whether to . . . lease. . . ." 16 U.S.C. § 3120(a) (emphasis added). This language anticipates by its terms that evaluation will precede leasing. Furthermore, the Secretary must determine the size

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9. Petitioners also imply (but do not assert) that there is a statutory conflict between the procedures required by section 810(a) and the provisions of OCSLA governing oil and gas leasing. No such conflict exists. OCSLA is not a single purpose statute; it contains numerous requirements intended to protect the environment. *See, e.g.*, 43 U.S.C. § 1346. If a potential conflict existed, any ambiguities in statutory language would have to be resolved in favor of a construction that accommodates both statutes. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective,'" quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Additionally, ANILCA was adopted subsequent to OCSLA, and Congress must be presumed to have been aware of OCSLA's provisions and to have interpreted those provisions as compatible with section 810(a) of ANILCA. *See Director v. Perini North River Associates*, 459 U.S. 297, 319 (1983) (when interpreting statutes, courts "may presume 'that our elected representatives, like other citizens, know the law,'" quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)).

of an area to be leased prior to leasing. 43 U.S.C. § 1344(a). Section 810(a)(3)(B) of ANILCA requires that if leasing will restrict subsistence uses, the Secretary must insure that "the proposed [leasing] will involve the minimal amount of public lands necessary to accomplish the purposes of such [leasing]. . ." It would be impossible for the Secretary to reduce the size of lease sale areas in order to minimize impacts on subsistence uses if the evaluation of impacts occurs only after the lease sale has been held.

Second, post-lease consideration cannot fully account for subsistence uses unless the Secretary has the authority to withdraw leased tracts from production if he finds subsistence uses will be affected. The only bases for withdrawing or canceling a lease under the OCSLA, however, are: 1) if the lessee fails to comply with the OCS Lands Act, as amended, or any provisions of the lease or regulations issued under the Act (43 U.S.C. § 1334(c) and (d)); or, 2) if activity on the lease a) would probably cause serious harm or damage to life, property, any mineral, to the national security or defense, or to the marine or coastal environment, b) the harm will not disappear or decrease to an acceptable extent within a reasonable period of time and c) the advantages of lease cancellation outweigh the advantages of continuing such lease (43 U.S.C. § 1334(a)(2)(A)). Subsistence impacts are not one of the stated grounds for lease cancellation.[10] Even if the Sec-

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10. Impacts on subsistence uses may or may not translate into damage to the environment. It is conceivable that, by making certain tracts available for production and not others in an attempt to minimize impacts on subsistence uses, the Secretary will cause *adverse* environmental impacts. (For example, allowing production close to shore or near some non-subsistence resource or critical habitat.) The Secretary is not statutorily authorized to minimize these subsistence impacts *post*-leasing. Such impacts may only be minimized *prior* to leasing.

retary could cancel a lease to protect subsistence uses, the Secretary would have to pay millions of dollars for each withdrawn tract. Lessees are entitled to compensation for lease cancellation under 43 U.S.C. § 1334(a)(2)(C). To buy back just one Alaskan OCS tract after it has been leased and explored could cost the government over $50 million: the bonus bid paid by the oil company (which for some Alaskan tracts exceeds $30 million), plus the lessee's cost of exploring that tract, which could amount to $15 to $20 million, plus interest. The Secretary's reluctance to protect subsistence uses will increase as the cost of such protection increases. Lease cancellation was intended as a last resort for reversing bad leasing decisions if impacts which were unforeseeable at the time of the lease sale subsequently became known. Lease cancellation was not intended to replace the need for a comprehensive assessment prior to making the initial decision to lease.[11]

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11. This conclusion is fully consistent with this Court's decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984). That case held that nothing that occurs at the lease sale stage "directly affects" the coastal zone so as to require a determination of consistency under the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451, *et seq.* Two points distinguish *California* from this case. First, as the Court in *California* repeatedly emphasized, the CZMA itself provides states with power to veto leases at the exploration and production stages of offshore development as well as at the lease sale stage. ("The State can veto the [development and production] plan as 'inconsistent' [with its coastal management program]. . . . 43 U.S.C. § 1351(d) (1976 ed., Supp. III)." 464 U.S. at 340.) No corresponding post-lease cancellation authority exists under ANILCA. Second the Court's opinion in *Secretary v. California* rested in large part on "the lengthy, detailed and coordinated provisions of CZMA § 307(c)(3)(B), and OCSLA §§ 1344-1346 and 1351 . . ." 464 U.S. at 343. That detailed statutory coordination was a principal reason for the Court's conclusion that Congress intended to postpone consistency review to the later stages of OCS activities. There is no detailed coordination between ANILCA and OCSLA that would suggest an intent by Congress to defer ANILCA review to later stages.

Third, contrary to the federal petitioners' allegations, significant impacts on subsistence resources *can* occur during exploration, as the Ninth Circuit recognized in this case. "The by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans." *Gambell II*, 774 F.2d at 1426. The dangers from exploratory activities arise from two sources: noise and oil spills. Noise attributable to airplanes, ships and other mechanized traffic could cause reductions in animal populations which form the basis of the tribe's subsistence economy. As the Final Environmental Impact Statement (FEIS) for Norton Sound indicates, such noise may reduce the populations of whales, seals, and walrus. Sale 57 FEIS at 167, 177-80, 184.

There is also a real risk that oil spills from exploratory drilling will harm subsistence uses. In Norton Sound, the industry has used conventional jack up rigs to drill exploratory wells. The Norton Sound FEIS states that faults and thermogenic gas, two hazards present in Norton Sound, pose extreme dangers for jack up rigs. FEIS at TABLE III.A.1.1. The threat of significant spills was illustrated when a drilling rig loaded with fuel nearly broke apart while it was being towed in Norton Sound during one of the sudden and violent storms that periodically sweep the Bering Sea. Anchorage Daily News, September 22, 1982, pg. 1.

Oil spills during exploration could prove devastating. For example, a large oil spill could destroy the walrus hauling areas near St. Lawrence Island in the Bering Sea off Alaska. Because the people of St. Lawrence Island depend on walrus for over 80 percent of their food, such a

spill could threaten the entire island with starvation. Little and Robbins, Technical Report No. 89 at 294, 334, 343-44.

Petitioners' argument that compliance with section 810(a) can occur subsequent to leasing and therefore no injunction is necessary is without merit.

## IV

## INJUNCTIVE RELIEF DOES NOT PUNISH THIRD PARTY BENEFICIARIES OF AGENCY REFUSALS TO PERFORM NONDISCRETIONARY DUTIES

Petitioner Amoco argues that injunctive relief in this case will not "deter" Interior's violation of section 810(a), but instead will simply punish or harm petitioner. Brief of Amoco at 37-38. Amoco's deterrence argument is based on the assumption that once the Secretary has made a decision, the Secretary's mind cannot be changed by directing that additional facts be considered. But of course if this assumption is adopted then injunctive relief for violation of *any* procedural obligation would be pointless. Congress assumed the opposite; that forcing agencies to consider impacts on subsistence uses, and provide notice and hearings on those impacts, may indeed change substantive decisions. Courts, including this Court, routinely order agencies to reconsider decisions and follow proper procedures in doing so. *See e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420-21 (1970). If the mere fact that an agency has arrived at a decision is sufficient to conclude that further procedural steps would be useless, agencies would have an incentive to do that which Congress is attempting to prevent—rush to judgment with no concern for proper procedure and involvement of the public. An injunction against exploration prior to

section 810(a) compliance in this case will obviously "deter" the agency's violation in this case; *not* to enjoin the violation will encourage future violations.

Amoco's argument that an injunction "punishes" Amoco is simply a restatement of the "balance of the harms" aspect of injunctive relief. To the extent Amoco is harmed one could argue that it is also "punished," but that does not further the analysis. Amoco's true complaint is that it suffers a monetary loss[12] if leasing doesn't go forward, while "[p]laintiffs suffered no tangible injury by virtue of Interior's decision to issue Sale No. 57 and 83 leases without complying with ANILCA. . . ." Brief of Amoco at 47. But Amoco's point proves too much. The difficulty in quantifying the harm flowing from an agency's refusal to follow mandatory procedures increases the likelihood that "balancing of the harms" will become judicial policymaking. A court can speculate that the harm flowing from a procedural violation is as great or as small as the court desires. In more traditional cases courts are able to balance one quantifiable harm against another. If issuing an injunction would prevent $10 worth of harm but cause $25 worth of harm, for example, courts could be expected uniformly to deny injunctive relief. *See e.g., Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. App. 1970). As the values on either side of the equation become more

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12. This Court recently recognized: "Under the plain language of OCSLA [the Outer Continental Shelf Lands Act], the purchase of a lease entails no right to proceed with full exploration, development, or production . . . the lessee acquires only a priority in submitting plans to conduct those activities. If those plans, when ultimately submitted, are disapproved, no further exploration or development is permitted." 464 U.S. 312, 339 (1983). Since Amoco's lease plainly does not create any "right," it would be anomalous to find that Amoco's investments based upon the lease are sufficiently important to outweigh the value of a federal agency complying with an explicit directive from Congress.

difficult to quantify, however, the opportunity for courts to impose their own values, and the likelihood that different courts will reach different results in similar cases, increases. Fidelity to statutory directives becomes even more important in such circumstances.

The importance of procedural compliance should not turn upon the personal opinions of the court in which relief is sought, or the particular facts of individual cases. Speculation about relative benefits and costs is a value-laden legislative act—one that courts must avoid if a statutory command applies. The district court's opinion in this case illustrates the danger: the court "balanced" two competing policies—oil exploration and subsistence uses of the public lands, and made the policy choice that "the public interest favors continued oil exploration" (Pet. App. 43a) to the exclusion of procedures required by Congress. When *Congress* has determined that specific procedures should be followed, courts should not second guess the Congressional calculus. "In our constitutional system the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" 437 U.S. at 195.

## CONCLUSION

The relief ordered by the Court of Appeals in this case was appropriate and should be affirmed.

Respectfully submitted,

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*Northwest Coalition for Alternatives to Pesticides*
*Oregon Natural Resources Council*

DATED this 2nd day of October, 1986.

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*Counsel of Record

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IN THE

# Supreme Court of the United States

October Term, 1986

DONALD P. HODEL,
Secretary of the Interior; and

UNITED STATES DEPARTMENT OF THE INTERIOR,
*Petitioners,*

AMOCO PRODUCTION COMPANY; et al.,
*Petitioners,*

v.

PEOPLE OF
THE VILLAGE OF GAMBELL; et al.,
*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF AMICUS CURIAE OF NORTH SLOPE BOROUGH, et al. IN SUPPORT OF RESPONDENTS PEOPLE OF THE VILLAGE OF GAMBELL, et al.

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AMOCO PRODUCTION COMPANY, et al.,

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v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

Respondents.

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On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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# BRIEF OF AMICI NORTH SLOPE BOROUGH, INUPIAT COMMUNITY OF THE ARCTIC SLOPE, UKPEAGVIK INUPIAT CORPORATION AND KODIAK AREA NATIVE ASSOCIATION IN SUPPORT OF RESPONDENTS PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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## INTEREST OF AMICI CURIAE

Amici are organizations which represent, in overlapping capacities, Alaska Natives who reside in the coastal regions of rural Alaska. The North Slope Borough is a political subdivision of the State of Alaska. Pursuant to Supreme Court Rule 36.4, the consent of the parties for the filing of this brief is not required. The North Slope Borough is the northernmost regional municipality in the United States, comprising 88,281 square miles adjacent to the Arctic Ocean. The great majority of the population of the Borough (84% according to 1980 U.S. Census data) are Natives and are dependent upon the sea ice regions off the Alaskan coast for their subsistence.

The Inupiat Community of the Arctic Slope (ICAS) is a regional tribal organization organized under the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq.,

and represents the Native Eskimo people of an area roughly coextensive with the North Slope Borough.

Ukpeagvik Inupiat Corporation (UIC) is the Native village corporation organized under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 et seq., for Barrow, Alaska.

Amici, in a variety of forums, have consistently stressed the necessity of protecting subsistence activities in the face of pressure for continued oil development in sea-ice areas. Amici ICAS and UIC, in a case consolidated for oral argument in the Ninth Circuit with Village of Gambell v. Clark, 746 F.2d 572 (9th

Cir. 1984) (Gambell I), claimed that the Inupiat people retain aboriginal title in sea-ice areas beyond the legal boundaries of the State of Alaska, because the extinguishment provisions of ANCSA, 43 U.S.C. § 1603, only purported to extinguish such rights "in Alaska." Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984). The Gambell I plaintiffs took a different approach -- they argued that "in Alaska" should be construed consistently in ANCSA and in the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101 et seq. The Court of Appeals in Gambell I recognized that "the two statutory provisions are clearly related," 746 F.2d at 580, but construed "in Alaska" in each to include the broad geographical region of Alaska, including the OCS and its superjacent waters. Id. at 575. Therefore, in the sea-ice areas beyond

the State's 3-mile limit, the Court of Appeals applied both ANCSA's extinguishment provisions and ANILCA's subsistence protections. ICAS and UIC's petition for certiorari was denied, 106 S. Ct. 68 (1985), and ICAS v. United States came to an end.

Now, however, the Petitioners argue that ANILCA does not apply to the OCS region (although they are presumably satisfied with the Court of Appeals' holding in Gambell I that ANCSA does apply there). Amici wish to remind the Court that the interpretations of ANILCA and ANCSA are inextricably intertwined. If ANILCA does not apply to areas not specifically "in Alaska," then ANCSA does not either, and the Native people retain aboriginal rights there. If so, Petitioners should be precluded from continuing their development activities in the OCS to the extent that such activities

interfere or impinge upon those aboriginal rights, unless and until the Natives consent to those activities, or until aboriginal rights in the area are properly and lawfully extinguished. Neither of these conditions has been satisfied, and Petitioners' development activities are properly subject to injunction.

If this Court holds that neither ANCSA nor ANILCA applies in areas not legally "in Alaska," it should remand this case to the Court of Appeals for a determination of whether other legal theories preclude aboriginal rights in the case area, or to the District Court to provide to the Respondents the opportunity to prove, as a factual matter, their use and occupancy of the areas in dispute.

## SUMMARY OF ARGUMENT

For centuries the Native people of Alaska have made continuous, extensive and exclusive use of vast areas of rural

Alaska and adjacent marine areas. Their occupancy of territory outside the State of Alaska, but subject to United States jurisdiction and control, gives rise to aboriginal rights under federal law which have never been extinguished. The Village of Gambell plaintiffs initiated this action to prevent outside oil developers from interfering with their occupancy of sea and sea-ice areas which had long served as their hunting and fishing grounds. Such interference both violates their aboriginal rights and threatens the destruction of the Eskimos as a people.

The Court of Appeals in Gambell I acknowledged as unique and undisputed the factual basis for the Natives' claim:

> Factually, no aboriginal group has ever used water and ice as intensely as have the Eskimos. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, and during this period the Eskimos treat the ice as a mere extension of the land. They set up

> camps on the ice. They build roads on it. And, most importantly, they hunt and fish on it. . . . Eskimos have relied on the sea to provide them with most of their necessities. They have relied on the oceans to provide them with food, clothing, fuel, and the basic material for making hunting equipment such as kayaks and harpoons . . . .
>
> Because ice areas are not physically different from land during long periods of the year, and because Eskimos have generally relied on the oceans for most of their food, fuel, and clothing, they have not traditionally recognized sharp distinctions between land and water. Simply stated, the sea is so central to the life of an Eskimo that s/he recognizes no distinctions between the two.

Gambell I at 576. The Eskimo occupation of the sea-ice and the rights which flow therefrom are not based on a technical or fictitious presence of any sort.

The threat to Eskimo survival from OCS development has steadily increased. There have been two major 5-year OCS leasing schedules since 1980 contemplating at least eleven major federal lease sales off northern and western Alaska.

An EIS relating to just one sale admits that "[d]isturbance of key species and use areas which the villages of Barrow, Nuiqsut and Kaktovik use for subsistence is very likely." The EIS authors expected that that sale "could have severe effects on the viability of the Inupiat people over time," and could jeopardize the "continued existence" of the bowhead whale, upon which they depend.[1] Thus, the amici are concerned not for abstract legal rights but for their continued physical existence.

The Court of Appeals in Gambell I recognized that ANCSA and ANILCA are related statutes and determined that both the extinguishment provision of ANCSA, 43 U.S.C. § 1603(b), and the subsistence provisions of ANILCA, including 16 U.S.C.

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[1] Bureau of Land Management, Diapir Field Final EIS, OCS Proposed Oil and Gas Lease Sale 71 (May 1982) at E-17, 136.

§ 3120(a), apply not only within the legal boundaries of the State of Alaska but in the entire geographic vicinity, including the OCS and its superjacent sea-ice and waters. Although Petitioners now challenge the applicability of ANILCA to the OCS, amici believe that the related decision to construe ANCSA to apply outside the State's borders is more clearly in error. In reaching the conclusion that ANCSA extinguishes aboriginal rights outside Alaska, the Court of Appeals failed to heed this Court's repeated admonitions that a Native people's aboriginal rights are secured by Federal law. And, it refused to apply the rules of construction that this Court has held must be applied to a statute affecting Native rights.

The Ninth Circuit's in-Alaska-means-outside-Alaska holding is all the more incredible in light of history of Gambell

I. On a motion for a preliminary injunction, Judge Fitzgerald found that the Native plaintiffs did not have a strong likelihood of success in establishing that "public lands in Alaska" included areas outside Alaska. Order (March 14, 1983) at 7. On motions for summary judgment, Judge von der Heydt ruled that "in Alaska" was limited to areas within State boundaries, and rejected plaintiffs' efforts to "manufacture an ambiguity":

> To determine the meaning of "public lands" the court need merely look to the definitional section of Title I of ANILCA. . . . Public lands means "land situated in Alaska" to which the United States holds title. . . . The court believes the plain meaning of this phrase is clear and rejects plaintiffs' attempts to manufacture an ambiguity. The court has also reviewed the legislative history and further concludes there is no persuasive evidence that Congress intended the phrase "public lands", as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska. It is significant to the court that Congress did not mention the Outer Continental Shelf in

> deliberations concerning both § 102(3) and § 810(a).

Memorandum and Order (April 4, 1983) at 2. Counsel for the federal and oil company defendants conceded, in briefs and oral argument to the Court of Appeals, that "in Alaska" has a clear meaning, and that the OCS is not "in Alaska."[2]

Thus, when the Court of Appeals held that, by extinguishing aboriginal rights "in Alaska," Congress also extinguished the Natives' aboriginal rights outside Alaska, it overrode the concessions of the parties and the rulings of both of the District Judges for the District of Alaska. Its holding sends a green light to other courts to construe sua sponte statutes that, like ANCSA, terminate some

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[2] See, e.g., Opposition of Appellees ARCO Alaska, Inc., et al., to Plaintiffs' Emergency Motion for Injunction Pending Appeal, at 35 (April 20, 1983); see also ICAS v. United States, 746 F.2d 570 (1984), Brief of Federal Appellees at 34 n.22 (April 1983).

Native rights, in overly broad and unintended ways.

**ARGUMENT**

In reviewing the geographic scope of ANILCA, this Court should reverse the Court of Appeals' holding in Gambell I regarding the geographic scope of ANCSA for the following reasons:

1. This Court has always protected Indian title and aboriginal rights from encroachment by governmental or private parties. The failure of the Court of Appeals to uphold Native rights in areas where the United States has extended its jurisdiction and control is inconsistent with this Court's rulings and sets dangerous new precedents. The consequences here are especially significant: This case does not involve ancient claims by the distant descendants of an Indian tribe long since assimilated into American life, but the present-day rights of

an aboriginal people that, to this day, depend upon aboriginal subsistence activities in some of the most isolated areas of North America.

2. This Court has always held that Native rights are not to be abrogated by implication and that statutes dealing with Indian rights must therefore be explicit as to any such abrogation. In defiance of this, the Court of Appeals held that ANCSA impliedly abrogates Native rights by interpreting the term "in Alaska" to mean, in effect, "outside Alaska." This departure from settled rules of decision in cases involving Native rights threatens Native rights nationwide and leads to absurd results.

A. The Gambell I Opinion Establishes a Novel and Erroneous Departure from the Law of Aboriginal Rights, Violating Principles That Have Been Established for Two Centuries.

In attempting to deal with the Eskimos' compelling factual situation, the Court of Appeals enunciated a new principle of the law of aboriginal rights; it held that a statute extinguishing rights in one location should be read to extinguish rights in another. This proposition is manifestly erroneous, and requires the misconstruction or contradiction of decisions of this Court spanning two centuries, which have shown a commitment to protecting aboriginal rights even in extraordinary circumstances.

From Chief Justice Marshall's observation in 1832, that the protection of aboriginal occupancy rights is "evidenced by our history, in every change through

which we have passed," Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832), to the Court's reminder in March of 1985 that the "Indians' right of occupancy is 'as sacred as the fee simple of the whites,'" County of Oneida v. Oneida Indian Nation, 470 U.S. ___, 84 L. Ed. 2d 169, 179 (1985) (Oneida II), this Court has insisted that aboriginal rights be respected as American jurisdiction is extended to new areas:

> From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites." This principle has been reaffirmed consistently. Thus, as we concluded in Oneida I, "the possessory right claimed [by the Oneidas] is a federal right to the lands at issue in this case."

Id. (citations omitted; emphasis in original).

In this context, the Court has stated that its decisions "emphasize 'Congress' unique obligation toward the Indians.'" Id. at 191; Morton v. Mancari, 417 U.S. 535, 555 (1974). In Oneida II, the Court held that the tribal rights at stake were valid and enforceable notwithstanding a 175-year delay in the commencement of a lawsuit to secure the tribe's claim. Irrespective of the unusual facts of that case, and the potentially dramatic consequences it raised for land titles in New York State, the Court could find no relevant legal basis for holding the Oneidas' claims barred.

Here, the unusual setting of the Eskimos' aboriginal domain has led the lower courts to repudiate aboriginal rights without any bona fide legal basis for doing so. The Court of Appeals' holding that such rights can be extinguished by implication is a frontal

assault on the doctrine of aboriginal rights, and is totally without merit.

B. Aboriginal Rights Are Cognizable in Sea-Ice Areas.

The Court of Appeals assumed rather than decided that plaintiffs had aboriginal rights in the sea-ice areas above the Norton Sound lease-sale area. Gambell I at 573 n.1. Native rights in sea-ice area far from shore are, as shown below, a matter of factual proof. They are not fundamentally unusual as a matter of law.

The nature and scope of Native aboriginal rights is governed by several well-defined principles, which have been established since "the time of the Revolutionary War." Oneida II at 178. First and foremost, aboriginal rights do not arise form treaties or statutes, but from the provable facts of aboriginal use and occupancy. United States v. Santa Fe

Pacific R.R. Co., 314 U.S. 339, 345 (1941); Kramer v. United States, 261 U.S. 219, 229 (1923). The Court has emphasized that the Native use and occupancy entitled to legal protection is to be determined with reference to the way of life, habits, customs and usages of the Natives, and not by Anglo-American property concepts. Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835).

As a result, aboriginal rights have been recognized or acknowledged, by treaty or otherwise, both with respect to inland waters[3] and in ocean waters[4].

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[3] Worcester v. Georgia, 31 U.S. (6 Pet. 515 (1832); Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487 (1964); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), remanded on other grounds, 623 F.2d 448 (6th Cir. 1980), decree modified, 653 F.2d 277 (6th Cir. 1981).

[4] Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962); Washington v. Washington State Commercial Passenger Fishing Vessel

Congress has also repeatedly acknowledged its duty to protect Native rights in ocean areas in a variety of contexts. See, e.g., Marine Mammal Protection Act, 16 U.S.C. §§ 1367-1407; Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801-82; Endangered Species Act, 16 U.S.C. §§ 1531-42.

Recognition of fundamental Native rights and interests in offshore areas, including rights secured by treaty, continues to be the acknowledged policy of the United States. See, for example, Treaty with Canada Concerning Pacific Salmon, done Jan. 28, 1985, T.I.A.S. No.___, art. XI; Pacific Salmon Treaty Act of 1985, Pub. L. No. 99-5, 99 Stat. 7 §§ 2(H), 3(a), 3(c)(4), 3(e)(3) and 4(b). See also Kaiser Aetna v. United States, 444 U.S. 164 (1979); Carter v. Hawaii,

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Ass'n, 443 U.S. 658 (1979).

200 U.S. 255 (1906); Damon v. Hawaii, 194 U.S. 154 (1904), in which the Supreme Court upheld extensive private rights in ocean waters and navigable ponds despite the absence of such rights at common law. Carter and Damon, in particular, were heavily relied upon by the Interior Solicitor in his decision in Aboriginal Fishing Rights in Alaska, 57 Int. Dec. 461 (1942), in which he held that the extent of Native rights in offshore areas had to be determined with reference to the facts of Native use and occupancy.

Aboriginal rights as a doctrine presumes federal paramountcy, and aboriginal rights in an area become secured under federal law when federal jurisdiction extends to cover territory occupied by Natives.

Congress has acted consistently with this understanding, even when extending federal jurisdiction into marine areas.

In 1953, it enacted the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 et seq., and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 et seq. The latter asserted federal jurisdiction and control over submerged lands beyond state boundaries. A House Report makes it clear that Congress did not believe that the federal government's paramount powers under United States v. California, 332 U.S. 19 (1947), and its progeny by themselves defeated valid pre-existing rights.

> OCSLA asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the land and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires as a matter of policy and law, that the property rights of individuals in

> and to such lands and resources be recognized and confirmed.

H. Rep. No. 215, 83d Cong. 1st Sess., reprinted in U.S. Code Cong. & Ad. News 1385, 1441 (1953) (emphasis added).[5]

In 1976, Congress enacted the Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801 et. seq. That Act extended United States jurisdiction to regulate marine fisheries from the existing territorial sea to 200 miles from the

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[5] Both SLA and OCSLA contain savings clauses which provide that: "Nothing herein contained shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this [Act] . . . . " 43 U.S.C. §§ 1315, 1342. The Senate Report on SLA explained that this savings clause "follows the historic Congressional practice of exempting form the operation of statutes of this character existing third party rights, if any there be." S. Rep. No. 133, 83d Cong., 1st Sess. 21 (1953). Similarly, the Senate Report for OCSLA stated: "Section 14 is a 'Savings Clause," in that it protects any rights in the Outer Shelf area that may have been acquired prior to the effective date of the Act." S. Rep. No. 411, 83d Cong., 1st Sess. 14 (1953).

coastline. The Senate Commerce Committee emphasized that the Act should not be construed to affect the fishing rights of Native Americans, whether established by treaty or any other law. S. Rep. No. 416, 94th Cong., 1st Sess. 36 (1975). Again, such Congressional action cannot be squared with the proposition that Native rights are abrogated by the mere extension of United States sovereignty into ocean areas. Instead, as we have observed, the real significance of these statutes is that they trigger the federal government's duty to protect pre-existing Native rights in those areas. See Passenger Fishing Vessel, supra, 443 U.S. at 668.

There is no reason to create a brick wall at the ocean's edge, beyond which basic principles of American law, recognized since the Revolutionary War, cannot apply. As this Nation increasingly as-

serts its sovereignty in ocean areas[6], it is imperative that the fundamental protections accorded to and required by Natives by the federal doctrine of aboriginal rights continue in force.

C. The Court of Appeals' Opinion Authorizes Broad and Unprincipled Extensions of Statutes Abrogating Indian Rights and Is Inconsistent with the Opinions of This Court.

The rule in Indian law is that ambiguities in statutes are to be construed in favor of the Indians. This canon has been said to be "eminently sound and vital," Bryan v. Itasca County, 426 U.S. 649, 655 n.7 (1976), and has been consistently reaffirmed:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the

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[6] See, e.g., Exec. Proc. 5030, 48 Fed. Reg. 10605 (March 10, 1983), proclaiming a 200-mile Exclusive Economic Zone in which the United States has extensive sovereign rights and jurisdiction.

> Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. "Absent explicit statutory language," this Court accordingly has refused to find that Congress has abrogated Indian treaty rights.
>
> The Court has applied similar canons of construction in non-treaty matters. Most importantly, the Court has held that Congressional intent to extinguish Indian title must be "plain and unambiguous," and will not be "lightly implied." Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," the Court concluded that it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy."

Oneida II at 187 (citations omitted).

The Ninth Circuit's decision stands in blatant defiance of these principles. Here, the court began with a statute that, on its face, is clear and unambiguous: The extinguishment provisions of ANCSA apply "in Alaska," and nowhere else. There is no "plain and unambiguous" statement that aboriginal rights

outside Alaska are extinguished. Under the principles reaffirmed in Oneida II, that should have ended the matter.

The Ninth Circuit, however, combed the legislative history in order to "manufacture an ambiguity." Then, in analyzing that history, it ignored the repeated statements by congressmen, congressional committees, and key witnesses at congressional hearings, that the scope of the settlement was coextensive with the State of Alaska. Instead, it relied on an isolated comment by a private party in a 1969 hearing. On the basis of that comment, it held that Congress in 1971 extinguished aboriginal rights outside Alaska, despite the plain language of the statute.

This holding makes a mockery of this Court's decisions and invites other courts to cast aside settled rules of statutory construction whenever Congress

extinguishes some Indian rights. In that setting, the Ninth Circuit apparently believes it is free to expand the extinguishment provisions at will. This Court should correct that holding.

1. There Is No Ambiguity in ANCSA; By Creating One, the Court of Appeals Wreaks Havoc with Rules Defining State Boundaries, and Contravenes Basic Principles of Federal Law.

By its terms, § 4(b) of ANCSA only extinguishes aboriginal rights "in Alaska." 43 U.S.C. § 1603(b). The language in the statute, which extinguishes aboriginal title in submerged lands "both inland and offshore" is qualified by specific reference to areas "in Alaska."

The Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, § 2 (1958), provides that "[t]he State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the

Territory of Alaska." Under firmly established law, "territorial waters" comprise a three-mile belt adjoining the coastline. United States v. California, 332 U.S. 19, 33 (1947). Section 6(m) of the Statehood Act made applicable to Alaska the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., which limits the seaward boundary of Alaska to "a line three geographical miles distant from its coastline." 43 U.S.C. § 1312. Thus, by referring to areas "in Alaska," Congress referred to well-defined territory, known to comprise approximately 375 million acres.

When Congress has intended to legislate with respect to OCS areas outside state boundaries, it has done so expressly. For example, in the Energy Policy and Conservation Act, Congress stated that "[t]he term 'United States' when used in the geographical sense means all

of the States and the Outer Continental Shelf." 42 U.S.C. § 6202(5) (emphasis added). See id., § 6202(10). Conversely, in the many statutes in which it has legislated with respect to areas "in" a particular state, its intent clearly was to reach only to the boundaries of that state, and not to vast areas beyond. See, e.g., 43 U.S.C. § 391, establishing the Reclamation Fund with monies received from the sale of public lands "in . . . California, . . . Oregon [and] Washington," among other states. It has never been suggested, of course, that monies received from the sale of OCS lands bordering these states are subject to the provisions of § 391.

The term "in Alaska" is itself used in numerous sections of ANCSA in addition to § 4. That "in Alaska" means exactly what it says is most clear in 43 U.S.C. §§ 1610, 1611, 1616 and 1621 (and also

§ 6(b) of the Statehood Act), in which rights in "public lands in Alaska" are discussed.[7] These sections provide, among other things, for land withdrawals, exchanges, and selections "in Alaska" by the State and regional corporations. Obviously, it was not Congress' intention that the State and Native regional corporations might select, or acquire through exchange with the Secretary of the Interior, OCS lands outside state boundaries.

In short, there is no ambiguity here. By artificially creating one, the Ninth Circuit opinion wreaks havoc with statutes applicable "in" particular states, threatening to create absurd results. In the special context of Indian aboriginal rights, the court's

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[7] "Public lands" are defined, in 43 U.S.C. § 1602(e), as all Federal lands and interests therein located in Alaska," with limited exceptions.

manufactured ambiguity is squarely inconsistent with this Court's decisions safe-guarding such rights.

2. ANCSA's Legislative History Provides No Support for the Extraordinary Decision of the Court of Appeals.

S. 1830, 91st Cong., 1st Sess. (1969), a predecessor to ANCSA, provides direct evidence that Congress understood that the OCS is not "in Alaska." Section 12 of S. 1830 earmarked certain mineral revenues for Alaska Natives. Subsection 12(a)(1) addressed minerals "located in all public lands in Alaska." Subsection 12(c), separately addressed minerals "from the Outer Continental Shelf bordering the State of Alaska." In drafting and introducing this bill, the Administration and the Senate Committee on Interior and Insular Affairs demonstrated a clear understanding that the OCS is not "in Alaska."

Despite this the Court of Appeals reads "in Alaska" to include, in addition to the 375 million acres within Alaska, hundreds of millions of acres comprising the OCS outside Alaska.[8] It finds ambiguity in the phrase "in Alaska" on the basis of the definition of Norton Sound in Webster's New Geographical Dictionary and in the language and legislative history of ANILCA, which was enacted nine years after ANCSA. Gambell I at 575-76.

ANCSA's legislative history indicates that Congress was well aware that the geographic scope of the Act was coincident with the State. For example, the committee reports repeatedly characterize the subject of ANCSA as Native

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[8] In debates on ANILCA, the OCS bordering Alaska was stated to comprise from 203 to 300 million acres. See 124 Cong. Rec. S10, 106-07 (daily ed. June 29, 1979) (Sen. Stevens) (258.4 million acres), 125 Cong. Rec. 44 (1979) (Rep. Udall) (203 million acres); id. at 10,285 (Rep. Seiberling) (300 million acres).

claims "to the lands which now comprise the State of Alaska." Notably, this characterization is found in the Senate committee reports on bills containing extinguishment provisions that in all material respects are identical to those enacted,[9] and was repeated on the floor of the Senate by Senator Jackson, the Chairman of the Committee on Interior and Insular Affairs.[10] Furthermore, key congressmen repeatedly referred to the Native claims being extinguished as claims

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[9] See S. Rep. No. 91-925, 91st Cong., 2d Sess. 46, 47 (1970) ["1970 Senate Report"]; S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971), reprinted at 117 Cong. Rec. 38435, 38436 (1971). See also H.R. Rep. No. 92-523, 92d Cong., 1st Sess (1971), reprinted in [1971] U.S. Code Cong. & Ad. News 2192, 2241 ["1971 House Report"], in which Rep. John Saylor, the ranking minority member of the House Committee on Interior and Insular Affairs, stated that the Act settled claims "based on aboriginal use and occupancy of lands comprising the State of Alaska."

[10] 116 Cong. Rec. 24208 (1970); 117 Cong. Rec. at 38433 (1971).

covering "the State of Alaska," "375 million acres," or "land in the State"; none referred to claims covering, in addition, the vast ocean areas outside Alaska.[11]

Congress' intent to settle only Native claims within the State is consistent with the underlying purpose of the Act, which was to resolve the conflict under the Statehood Act between Native claims and State land selection rights. This was a conflict that, like the State-

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[11] See, e.g., Hearings Before the House Subcomm. on Indian Affairs on H.R. 3100, H.R. 7039, and H.R. 7432 (1971) ["1971 House Hearings"] at 65 (Rep. Aspinall, Chairman, House Comm. on Interior and Insular Affairs; "maximum of 375 million acres"); 340 (Rep. Begich, Alaska; "375 million acres"); and 370 (Harrison Loesch, Assistant Secretary of the Interior, "the entire State of Alaska"); 117 Cong. Rec. at 36854 (Rep. Aspinall; "375 million acres," "most of the State"), 36857 (Rep. Haley; "land in the State"); 38443 (Sen. Allot; "300 million acres"); and 38445 (Sen. Harris; "nearly all of the State's 375 million acres of land").

hood Act, pertained exclusively to areas within the State, and did not implicate ocean areas outside State boundaries.

The Senate Committee noted that the United States would not be the

> main beneficiary from clearing title to lands in Alaska . . . To the State of Alaska, a settlement would remove the cloud which the Native Claims cast on all land titles in Alaska . . . [State selections under the Statehood Act could then] proceed, free from the threat of litigation and conflicting claims.[12]

In contrast, nowhere in the voluminous legislative history is there the slightest suggestion that the federal government would benefit from ANCSA because of its interest in the OCS, although other federal benefits were noted.[13] The purpose of the Act was to resolve the conflicts created by Native claims within

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[12] 1971 Senate Report at 83, 86.

[13] See, e.g., 117 Cong. Rec. at 36469 (clearing federal title to land within the State).

the State, not to settle claims to vast areas outside Alaska.

The legislative history relied upon by the Court of Appeals fails to support its extraordinary expansion of the geographic scope of ANCSA. For its version of ANCSA's legislative history, the Court of Appeals relied largely on the statements in Congressional hearings by representatives of the Alaska Federation on Natives ["AFN"], the Western Oil and Gas Association ["WOGA"], the State of Alaska, and the National Wildlife Federation ["NWF"]. Gambell I at 578. It did not cite the statement of a single congressman or congressional committee indicating that ANCSA would be applied outside state boundaries. The consistent focus of the statements it did cite was the inclusion in ANCSA's extinguishment provisions of waters, submerged lands, and hunting and fishing rights within state boundaries,

not the extension of the Act to vast areas outside Alaska.

AFN representatives, for example, clearly understood the Act to apply only within the State. The following statements are illustrative:

> By its actions on these bills Congress will extinguish our valid land rights in approximately 375 million acres of land in Alaska . . . Fundamentally these bills are in many respects quite similar. All of them would extinguish our land rights throughout the State of Alaska.
>
> AFN believes a settlement extinguishing the property rights of the Natives to substantially the entire State of Alaska must recognize that different groups of Alaska Natives have property rights in different lands aboriginally used and occupied by them.
>
> We are not asking for anything. We are offering the U.S. Government 84 percent of our property. We are offering them 300 million acres to satisfy the needs of others in this State and to satisfy the needs of the United States in the way of

Federal reserves, wildlife refuges, wilderness areas.[14]

Similarly, the State, in urging that the settlement extend to "lands, waters, and submerged areas in Alaska,"[15] gave no indication that it should encompass areas outside the state. Nor did NWF argue for a geographic enlargement of the Act. Even the WOGA statements are far from clear on this point. While its statements in the course of the 1969 hearings do contain passing references to the OCS, no such references are found in its subsequent statements.[16]

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[14] 1971 House Hearings at 181; Hearings Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971) ["1971 Senate Hearings"] at 353, 475 (emphasis added).

[15] Hearings Before the Senate Comm. on Interior and Insular Affairs on S. 1830, 91st Cong., 1st Sess. (1969) at 234.

[16] For example, with respect to H.R. 3100, which extinguished claims of "aboriginal title in Alaska . . . including any aboriginal hunting and fishing rights that may exist" and claims

The Court of Appeals also suggested that "Congress could not have been unaware of such widely known facts of Native Alaskan life," referring to Native use and occupancy of ocean areas far outside State boundaries. Gambell I at 576. Yet to document such facts, the panel turned to materials that were published after the enactment of ANCSA, such as the 1982 Norton Sound EIS. Id. at 576-77. The scant testimony it cites from the ANCSA hearings does not identify whether the areas being discussed were inside or

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"based on . . . use or occupancy of land or water areas in Alaska," WOGA said:

> The Declaration of Settlement contained in section 2 of H.R. 3100 is complete and comprehensive, and we have no changes to suggest in it. In particular, section 3 extinguishes claims to water, as well as land, which is needed because some of the claims are asserted for water areas.

1971 House Hearings at 2, 353.

outside the three-mile expanse of coastal waters.

Finally, the Court of Appeals observed that "the needs of Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives . . . ; the land was granted, in part, 'in lieu of subsistence hunting and fishing rights' . . . . " Gambell I at 576. Yet it is clear that no provision in ANCSA -- including the Native land grants -- provides even the remotest protection for subsistence activities in the areas at issue in this case. The total absence of such protection simply confirms that these areas are not within the scope of ANCSA.[17]

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[17] Even in Alaska the allocation of land to the Eskimos was inadequate for subsistence purposes because it was done on the basis of population, not subsistence needs. Given the climate and geography of northern and western Alaska, hunters range more widely in pursuit of game than Natives from other regions.

Thus, on the basis of a passing reference by a private party in a 1969 hearing, the Court of Appeals held that, when it enacted ANCSA in 1971, Congress intended it to apply to millions of acres outside Alaska. This holding contradicts the legislative history and the clear understanding of virtually everyone involved.

3. The Court of Appeals' Resolution of Perceived Ambiguities Against the Natives Violates Fundamental Principles of Federal Indian Law.

The Court of Appeals' opinion states that "[t]he possibility of two meanings of the phrase "in Alaska" renders the provision ambiguous, justifying reference to the legislative history." Gambell I

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The Act's provision of comparatively small parcels to the Eskimos failed to recognize this. To now interpret ANCSA to extinguish rights outside Alaska exacerbates this disproportion between the territory granted to the Eskimos by ANCSA and the territory they need to survive.

at 575. While we believe that there is no such ambiguity, and that the court's legislative history analysis is incomplete and unfair, its most egregious error is its failure to acknowledge and apply the settled rule that ambiguities in statutes affecting Indians are to be construed in the Indians' favor. This departure from settled rules of decision in Indian cases sets a dangerous precedent of national significance.

The Ninth Circuit apparently believed that it could disregard these rules because ANCSA was intended to terminate some Native rights. But ANCSA is not alone in this respect. For example, commencing in 1954, Congress enacted a series of termination statutes, which abrogated certain rights of specified Indian tribes throughout the United States. See generally, F. Cohen, Handbook of Federal Indian Law, 152-80, 810-18 (1982

ed.). Even in construing these statutes, the Court adhered to the traditional rules of decision applicable in Indian cases. See, e.g., Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968) (termination of reservation held not to extinguish hunting and fishing rights). The Court of Appeals' approach to ANCSA -- that in construing a statute terminating some Native rights there is no need to adhere to settled rules of decision in Indian cases -- thus sets the wrong precedent for construing a significant number of existing and prospective federal statutes. See Oneida II at 191 (discussing eastern land claim settlement acts).

The danger of this approach is amply illustrated by the decision in this case. If, in the light of uniform indications in the legislative history that Congress understood it was legislating with

respect to the State of Alaska, the phrase "in Alaska" can be "construed" to mean "in or out of Alaska," then the pledge to "respect the Indian right of occupancy," Oneida II at 187, has been reduced to an empty and cynical gesture.

The Ninth Circuit itself has held that statutes passed for the benefit of Indians "'must be interpreted as [the Indians] would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor.'" Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1257 n.6 (9th Cir. 1983), quoting Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).[18]

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[18] In United States v. Atlantic Richfield Company, 612 F.2d 1132, 1139 (9th Cir. 1980), the Court of Appeals held that this principle "operates with less force" because the Natives were represented by "such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark." In fact, however, during the hearings on the Act, the Eskimos were

Statements in ANCSA's legislative history to the effect that the extinguishment of aboriginal rights should be construed broadly, Gambell I at 575 n.3, do not obviate this principle; those statements hardly can be said to authorize a court to enlarge the geographic scope of the Act.

The principle is particularly important here, since ANCSA was politically dependent upon acceptance by Natives for its enactment. One of the basic parameters of such acceptance was that the Act was applicable within the State. The Native arguments on compensation were

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largely represented by the Arctic Slope Native Association (ASNA), not by the Alaska Federation of Natives, Justice Goldberg, or Attorney General Clark. Indeed, ASNA took positions at odds with those taken by AFN, never accepted the Settlement Act, and ultimately urged President Nixon by telegram to veto it. See 1971 House Hearings at 296-314. In any event, the issue is what the Natives understood the statute to mean, not what their lawyers may have believed.

consistently based on the scope of the claims they were relinquishing, and those claims were consistently characterized as comprising areas <u>within</u> the State. For example, an Inupiat representative testified:

> [A]nything less than 60 million acres for the entire statewide settlement is an act of dishonor. That amount of land is about 16 percent of the total State. It seems to us that when the United States takes our land, the retention of anything less than 16 percent certainly qualifies as an act of dishonor.[19]

To judicially extend ANCSA to vast ocean areas <u>outside</u> the State, 13 years after its enactment, is indefensible. It is precisely this kind of "construction" that the principle that doubtful expressions be resolved in the Indians' favor was designed to avoid.

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[19] 1971 House Hearings at 246 (statement of Joseph Upicksoun, President, Arctic Slope Native Association).

## CONCLUSION

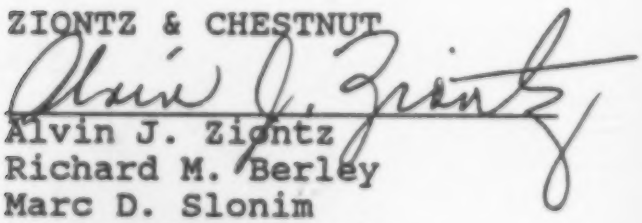
Any examination of the geographic scope of ANILCA must include the interrelated issue of the geographic scope of ANCSA. The Court should reverse the Court of Appeals' holding on the geographic scope of ANCSA's extinguishment and remand this case for further proceedings.

Dated: October 2, 1986.

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Nos. 85-1239 and 85-1406

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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DONALD P. HODEL, SECRETARY OF THE INTERIOR, et al., Petitioners,

AMOCO PRODUCTION COMPANY, et al., Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al., Respondents.

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# BRIEF AMICUS CURIAE OF THE STATE OF ALASKA

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PEOPLE OF THE VILLAGE OF GAMBELL, et al., Respondents.

---

# BRIEF AMICUS CURIAE OF THE STATE OF ALASKA

This brief is in support of respondents People of the Village of Gambell, et al. Under Supreme Court Rule 36.4, written consent of the parties is not required.

## INTEREST OF THE STATE OF ALASKA

This suit concerns the applicability of section 810 of the Alaska

National Interest Lands Act (ANILCA), 1/ 16 U.S.C. § 3120, to Federal oil leasing activities on the Outer Continental Shelf (OCS) in Alaska. It further concerns the proper injunctive standard for a district court faced with an apparent substantial violation of that section. Section 810 of ANILCA requires a federal agency to consider the impact of land use decisions upon the subsistence uses and needs of the many rural Alaskans who are dependent on subsistence for their livelihood.

Alaska did not, and does not, oppose the Federal lease sales at issue in this litigation (OCS Lease Sale 83,

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1/ Act of Dec. 2, 1980, Pub.L.No. 96-487, 94 Stat. 2371, codified at 16 U.S.C. § 3101 et seq.

in the Navarin Basin and OCS Lease Sale 57, in Norton Sound). However, Alaska does oppose OCS Lease Sale 92, in the North Aleutian Basin (Bristol Bay). This latter sale was enjoined on the basis of the Ninth Circuit's holding in this case. Parties to the Bristol Bay litigation are currently seeking this Court's review of that injunction. Hodel v. Akutan, Nos. 86-303 and 86-304, (9th Cir. filed Aug. 26, 1986).

The Ninth Circuit correctly held that the procedural protections of section 810 of ANILCA apply to activities in the OCS; that these procedural requirements must be complied with prior to the decision to lease; and that an injunction is, absent unusual circumstances, the appropriate remedy when the requirements are not met. Because this Court's decision herein may well

dispose of the questions in the Bristol Bay litigation, to which Alaska is a party, the State of Alaska submits this brief to assist the Court in its resolution of these issues.

Alaska joins with the State of California, along with other amici, in its brief on the injunctive standard issue and does not separately address that issue in this brief. Alaska herein addresses the ANILCA issues.

## ARGUMENT

### A. SECTION 810 OF ANILCA APPLIES TO LEASING IN THE OCS

The Ninth Circuit has twice held that the Alaska Native Claims Settlement Act (ANCSA) 2/ applies in the

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2/ Act of Dec. 18, 1971, Pub.L.No. (Footnote Continued)

Outer Continental Shelf in Alaska, and by its terms extinguished all aboriginal rights, including hunting and fishing rights, therein. Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984) cert. denied, ___U.S.___, 106 S.Ct. 68 (1985); People of the Village of Gambell v. Clark, 746 F.2d. 572 (9th Cir. 1984). This Court has to date declined review of the Ninth Circuit's holding on this point: certiorari was denied in the Inupiat Community case (___U.S.___, 106 S.Ct. 68 (1985)), and the cross petition on this issue of the respondents in this case, filed in

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(Footnote Continued)
92-203, 85 Stat. 688 codified at 43 U.S.C. § 1601 et seq.

March 1986, has not yet been acted upon. The State of Alaska agrees with the Ninth Circuit that ANCSA was intended to, and did, extinguish all aboriginal claims in Alaska, including claims in the Outer Continental Shelf contiguous to Alaska.

Alaska further agrees with the Ninth Circuit that the strong Congressional policy to protect the subsistence way-of-life embodied in ANILCA can only be effected if ANILCA is construed in pari materia with ANCSA, to afford protection of subsistence resources in the same geographical area that ANCSA extinguished claims.

That Congress' intent was to provide strong protection for the subsistence way of life is evident from the statements of Congressional policy and purpose, from the Congressional

findings, and from the workings of the Act itself. The Act provides that "It is ... the intent and purpose of this Act ... to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c). It is the policy of Congress that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...." 16 U.S.C. § 3112(1). Congress found that the opportunity for subsistence uses is "essential" to the very "existence" of rural Alaskans, and that "in most cases, no practical alternative means are available to replace the food supplies [provided by] subsistence uses...." 16 U.S.C. § 3111(1),(2).

In the substantive provisions of the Act, Congress took strong steps to implement this policy. The Act provides that subsistence uses of fish and wildlife on public lands "shall be accorded priority" over non-subsistence uses. 16 U.S.C. § 3114. Local participation in fish and game management was established, and the State was required to provide for the subsistence preference on public lands or lose authority to manage those resources. 16 U.S.C. § 3115. The Secretary is required to monitor the implementation of the subsistence preference. 16 U.S.C. § 3116. Subsistence commissions were established in the national parks and monuments to devise programs for subsistence hunting within those units. 16 U.S.C. § 3118. Finally, and the subject of this litigation, the Act

directs federal agencies to evaluate the effect on subsistence of land use decisions, including the decision to "lease." 16 U.S.C. § 3120.

Taken together, these provisions indicate that Congress found that the subsistence way-of-life needed protection, and that Congress intended to protect it.

The provision of ANILCA that is at issue provides:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands ... the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs ....

16 U.S.C. § 3120(a). The petitioners take the position that an oil and gas lease in the OCS is not a disposition

of "public lands" within the meaning of this section.

The term "public lands" is defined in ANILCA to mean "land[s] situated in Alaska which ... are Federal lands ...." The term "Federal land" is in turn defined as "lands the title to which is in the United States ...," and "land" means "lands, waters and interests therein." 16 U.S.C. § 3102. By combining the pertinent portions of the three definitions, the "public lands" to which ANILCA applies can be read to be "lands, waters and interests therein, situated in Alaska, the title to which is in the United States."

The oil companies and the United States encourage this Court to read this language not as it stands, but with substantial and substantive changes. According to them, the term

"public lands" is defined to mean "lands [WATERS AND INTERESTS THEREIN], situated in the State of Alaska, the formal, fee simple title to which is in the United States."

By omitting "waters, and interests therein" and including a requirement for formal, fee simple title, petitioners are able to rely on authority for the fact that the United States does not "own" the OCS. The parties do not dispute that the United States does not claim full legal title to the OCS in its entirety. But this lawsuit would not have arisen if the United States did not claim something in the OCS: this suit concerns the leasing of Federal oil and gas in the OCS. The oil companies do not claim that they may produce oil in the OCS without a lease from the United States.

While the United States does not claim all of the attributes of ownership in the OCS, it most assuredly does claim, as the brief for the United States points out, "sovereignty over the exploration and development of the natural resources on and within the OCS." Brief for the Federal Petitioners, quoting the Report of the House Committee on Merchant Marine and Fisheries on the 1985 OCSLA amendments. As the leases underlying this litigation exemplify, that sovereign claim includes the power to sell or otherwise dispose of those interests. Indeed, "interests" in the OCS are precisely what the United States does claim: full, complete and exclusive ownership of the natural resources (including mineral interests) found there.

The briefs of the United States and the oil companies are less than candid in their omission of any discussion of the words "waters, and interests therein" in ANILCA's definition of lands. The plain meaning of these words is that whatever the United States "has" is included within the ambit of the statute. The State submits that, where a sovereign is concerned, the power to dispose of a real property interest evidences sovereign "title" to that interest. 3/

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3/ 43 U.S.C. § 1333(a)(1) provides, in part, that "The ... jurisdiction of the United States [is] hereby extended to the subsoil and seabed of the outer Continental Shelf ... to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State ...." In Guess v. Read, 290 F.2d 622 (Fifth Cir. 1961), cert. denied 368

(Footnote Continued)

Since it is not disputed that oil and gas in the OCS must be leased from the United States, it cannot be disputed that the United States has title to those interests.

Even if the United States has title to natural resources in the OCS, petitioners argue that leases of those resources are outside the reach of ANILCA because they are not "situated in Alaska." They would change those words to read "situated in the State of Alaska," thus limiting ANILCA's application to the formal State boundaries within three miles of shore.

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(Footnote Continued)
U.S. 957 (1962) the court held that the "Continental Shelf Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf. 290 F.2d at 625.

ANILCA uses the term "Outer Continental Shelf" only once. 16 U.S.C. § 3141(a). That section directs the Secretary to "initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska ...." The inference to be drawn from the use of this language in this section is that absent the parenthetical statement, the Secretary's study would have included the OCS. Since the language is used in no other provision in ANILCA, the conclusion should be drawn that the term "Federal lands" (and thereby the term "public lands") includes the OCS unless Congress has specifically stated otherwise. Congress has evidenced, by section 3141(a), that when it wishes to exclude the OCS it does so.

The words "in Alaska" are commonly understood to mean not only the land and waters within the three mile limit, but also those waters contiguous to the State. Many a Seattle fisherman heads north each summer to fish "in Alaska" even though almost all of his activity takes place outside three miles. See, e.g., Sjong v. State of Alaska Dep't of Revenue, 622 P.2d 967 (Alaska 1981), appeal dismissed, 454 U.S. 1131 (1982). The term "exempt Alaskan oil" in the Crude Oil Windfall Profit Tax Act (26 U.S.C. § 4991(b)(3)) includes oil produced in parts of the OCS off the state. U.S. v. Ptasynski, 462 U.S. 74, 77-78 (1983).

The words "in Alaska" commonly connote the waters contiguous to the state. Congress has evidenced its ability to exclude the OCS from the

reach of ANILCA when it intends to do so. Section 810 of ANILCA applies to the OCS because Congress did not specifically exclude it.

This construction is consistent with the Congressional purposes. Congress, quite simply, intended to protect the subsistence way of life. Congress enacted a subsistence preference for fish and wildlife on federal lands. Congress strongly encouraged the State to enact a subsistence preference by providing that unless the State adopted such a law, fish and game on federal lands would be managed by the United States. Because the subsistence resources upon which rural Alaskans rely do not respect arbitrary political boundaries either on land or at sea, the State's subsistence plan applies to both Federal and State waters and

lands. 4/ Congress stated that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...."

Viewed in the light of the Congressional purposes, it is inconceivable that Congress intended to abandon its concern for subsistence at the three mile line. The Act as a

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4/ The State's fishing laws apply both in State waters and in the OCS. If it becomes necessary to limit commercial and sport harvesting of fishery resources in order to protect subsistence, the State limits those activities both within and without the three-mile limit. For example, the State closed waters to the taking of king crab in Norton Sound and around St. Lawrence, King and Little Diomede Islands. The waters were closed to protect subsistence harvest; the closures extend beyond the three-mile limit. 5 Alaska Administrative Code 34.935.

whole evidences a Congressional commitment that the United States will not unduly interfere with subsistence. Congress can not have intended that Federal oil leasing activities on land, where an oil spill can be fairly easily contained, must be undertaken only after an analysis of subsistence impacts, but at the same time that Federal activity which could have devastating effects on subsistence could take place just outside the three-mile limit with no regard for subsistence impact.

Finally, "in Alaska" must be construed to include the OCS in ANILCA because the phrase has been properly construed to include the OCS in ANCSA. ANCSA was intended to, and did, extinguish all aboriginal claims in Alaska. Many of those claims are based on

traditional hunting and fishing activities on the sea and on the sea ice in the coastal areas, that took, and take place without regard for the arbitrary three-mile limit. ANCSA was intended to be a fair and equitable settlement of all aboriginal claims. To conclude that Congress intended only to extinguish claims out to the three mile limit would be, as the State, the United States, the oil companies and the Ninth Circuit all agreed, "inconceivable." See, Brief for the United States in Opposition at 7, Inupiat Community of the Arctic Slope v. United States, No. 84-1801, July 1985.

When ANCSA was passed in 1971, Congress recognized that the transfer of land to the Natives was neither sufficient to nor intended to fully pro-

tect traditional subsistence activities. As the Ninth Circuit noted, the Senate version of ANCSA "included provisions directing the Secretary to protect subsistence uses on public lands." 746 F.2d at 580. Although the provisions were eliminated in conference, the committee report provided that the Committee "expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." Id.

It was hoped that federal and state land and wildlife managers would provide sufficient subsistence opportunity without further legislation. By 1980, Congress was of the opinion that this hope was misplaced. As a result, and in conjunction with passing the national interest lands legislation

provided for in ANCSA (see 43 U.S.C. § 1616(d)), Congress adopted the strong subsistence protection of ANILCA. The two statutes are truly sister statutes, and must be construed, as the Ninth Circuit has held, in pari materia.

B. THE SECRETARY MUST COMPLY WITH SECTION 810 OF ANILCA PRIOR TO LEASING

The gravamen of section 810 is that a federal agency must consider the effects on subsistence of proposed federal action in the decision-making process. Like the studies required by the National Environmental Policy Act (NEPA), 5/ the purpose of the section 810 analysis is to give the decision

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5/ 83 Stat. 852, 42 U.S.C. § 4321 et seq.

maker the best information on which to base the decision. Also like NEPA, while ANILCA section 810 is based on "significant substantive goals," its protections are "essentially procedural." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). Once the procedural requirements have been met, ANILCA provides that the agency may "manage or dispose of public lands ... for any of those uses or purposes authorized by ... law." 16 U.S.C. § 3120(d).

Congress declared that it was its policy that public lands be utilized so as to "cause the least adverse impact possible on ... subsistence uses ...." 16 U.S.C. § 3112(1). Congress wanted rural residents to have a meaningful role in decisions that might affect subsistence. 16 U.S.C. § 3111(5);

§ 3112(3). In furtherance of these policies, Congress provided that "[i]n determining whether to ... lease ... public lands" the Secretary must evaluate the effect of the action on subsistence, and must consider alternatives. Whenever the proposed Federal action threatens subsistence activities, the Secretary must give notice to the State and to subsistence groups, must notice and hold hearings, and must determine that a restriction of subsistence is necessary, that the minimal amount of lands necessary are involved, and that reasonable steps will be taken to minimize impacts on subsistence. 16 U.S.C. § 3120(a).

The clear terms of the section require the Secretary is to fully consider subsistence in deciding whether to lease. A hypothetical will serve to

illustrate the point. If the Secretary were faced with the choice of leasing one of two tracts, and the tracts were identical in their oil potential, and the projects as a whole would have the identical environmental impacts, but production from one tract would impact subsistence while production from the other tract would not, section 810 encourages the Secretary to choose the tract with no impact on subsistence.

The Secretary argues that the notice and hearing requirements of section 810 are not triggered at the lease sale stage if the impact on subsistence would not occur until the production stage. But this construction of section 810 would render the inclusion of the word "lease" in the section meaningless. For the mere act of leasing cannot, in and of itself, have an impact

on subsistence. ANILCA was enacted after the 1978 amendments to the OCS Leasing Act. As this court has noted, those changes clarified that "the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan for exploration, production, or development." Secretary of Interior v. California, 464 U.S. 312, 337 (1984). Since leasing, in and of itself, cannot impact subsistence, Congress must have intended that the Secretary's consideration of subsistence impact extend to the project as a whole.

In concluding that notice and hearing can be delayed until the production stage, petitioners rely on this Court's holding in Secretary of Interior v. California. That case

examined the need, at the lease sale stage, for a coastal zone consistency determination under section 307(c)(1) of the the Coastal Zone Management Act (CZMA). 6/ The word "lease" was not in that Act, and this Court found that Congress had expressly omitted it. 464 U.S. at 334. "It is surely not for us to add to the statute what Congress twice decided to omit." Id. at 334-335. Here, Congress has specifically included the word "lease," and it is just as surely not for this Court to read out of the statute a word that Congress has specifically chosen to include.

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6/ 86 Stat. 1285, 16 U.S.C. § 1456(c)(1).

Where the objective of the statute is to provide good information to aid in reasoned decision making, courts have required that the project be examined in its entirety rather than piecemeal. See, e.g., North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979); Commonwealth of Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979); County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975); Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984). The rationale for this rule is evident:

the earlier in a project that potential problems can be identified, the easier it is to avoid them. If local input is not sought until the production stage, it is too late for the Secretary to use that information "in determining whether to lease."

This Court's analysis in Secretary of the Interior v. California leads directly to the conclusion that section 810 must be complied with at the lease sale stage. In that case, the Court looked first to the language of the statute, and second to the purposes of the Act. Since the word "lease" was intentionally omitted from the statute, and since the purposes of the Act could be accomplished if compliance were delayed, the Court concluded that compliance was not required at the leasing stage. Here, the word "lease"

expressly appears in the statute; here, the overall objectives of the Act are met if compliance is required at leasing.

Finally, petitioners argue that compliance with the notice and hearing requirements is not necessary unless the Secretary is certain that subsistence input will occur. This reading of the Act is illogical, inconsistent with the purposes of the Act, and not supported by law. Particularly with respect to oil and gas activities, the risks of a project are of critical importance. Presumably, if the Secretary were certain that a major oil spill would occur under certain circumstances, he would not permit the activity under those circumstances. The Secretary's construction of the Act might obviate the need for subsistence

analysis even at the production stage and even in the face of the risk of devastating spills, as long as the occurrence of the spills were not "certain."

The Secretary cannot ensure that "utilization of the public lands in Alaska is to cause the least adverse impact possible on ... subsistence" unless he examines all the potential ramifications of his action in the light of the impact on subsistence. Rural residents cannot have a "meaningful role" in land use decisions if the certainty, rather than the threat, of impact is required.

The Ninth Circuit's conclusion that section 810's notice and hearing requirements are triggered whenever the proposed activity "may" significantly impact subsistence is fully supported

by case law. The language in section 810 -- "[N]o such [action] which would significantly restrict subsistence uses" -- is nearly identical to NEPA's requirement of an impact statement for any "major Federal actions significantly affecting" the human environment. 42 U.S.C. § 4332(2)(C). This phrase means that the agency must show there is "no substantial possibility that [the activity] could significantly affect the quality of the human environment." Quinonez-Lopez v. Coco Lagoon Development Corp., 733 F.2d 1, 2 (1st Cir. 1984). See also, Foundation for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172, 1177-78 (9th Cir. 1982)(whether the proposed activity "may significantly degrade"); Columbia Basin Land Protection Ass'n v. Schlesinger,

643 F.2d 585, 597 (9th Cir. 1981)(same); Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974)(whether "the project could significantly affect"); Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973)(if "the project may cause a significant degradation"). This case law is fully applicable to section 810 because the purpose of the procedural requirements of notice and hearing is to aid in the decision making process.

CONCLUSION

The decisions of the court of appeals that section 810 applies to

Federal actions in the OCS and that compliance is required at the lease sale stage should be affirmed.

Respectfully submitted,

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